IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 296

WILLIAM G. BURNS,
trading and doing business as International Advertising Agency,

Petitioner,

vs.

BEN JAFFE,

GUARANTEE RESERVE LIFE INSURANCE COMPANY of Hammond, Indiana, a corporation,

HAROLD S. SCHWARTZ,

HAROLD S. SCHWARTZ & ASSOCIATES, INC., and

EUGENE JAFFE,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

(Essential Parts of Record are Appended Hereto)

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, *to require the latter to review his appeal on the merits*, and shows:

Opinions Below.

No opinions were rendered by the District Court or the Court of Appeals. The latter's orders dismissing the appeal and refusing rehearing contain short factual recitals (which Petitioner claims are inaccurate).

Appendix, pp. 42, 56, 74, *infra*.

Grounds For Invoking This Court's Jurisdiction.

The Court of Appeals rendered judgment, dismissing Petitioner's civil appeal to it, on April 16, 1958.

Appendix, p. 56, *infra*.

His petition for rehearing was entertained and denied on May 23, 1958. The Court of Appeals stayed its mandate, pending the filing of this Petition for Certiorari, which is filed within ninety days.

Appendix, p. 74, *infra*.

Petitioner invokes this Court's general jurisdiction to review final judgments of the Court of Appeals, under 28 USC. 1254(1).

Particularly, he invokes this Court's discretion to grant him relief under its Rule 19, par. 1(b). He claims that the Court of Appeals itself—

> **"has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision."**

Question Presented For Review.

Petitioner seeks only to have this Court require the Court of Appeals to retain and review on the merits, his civil appeal from a judgment of the District Court. No review of the merits is now sought from the Supreme Court,—none could yet be made, because none has yet been made by the Court of Appeals.

Petitioner, a civil plaintiff in the District Court (N.D. Ill.), took an appeal from an adverse judgment of that court, to the Court of Appeals.

The appeal was timely taken and docketed, and the original record from the District Court was timely and properly filed, in the Court of Appeals. These facts have not been disputed by the appellees (respondents here) or by the Court of Appeals.

Thereafter, the Court of Appeals granted the appellant (petitioner) certain extensions of time to file his printed Appellant's Brief and Appendix. Then, when he timely filed petitions for further time therefor, the appellees objected and moved to dismiss the appeal for failure to get the Appellant's Brief and Appendix on file sooner. The Court sustained the appellees' objections and motion, and dismissed the appeal for lack of an Appellant's Brief and Appendix.

Appendix, pp. 42, 56, 74, *infra*.

His petitions for additional time were *filed within the time* allowed for filing his Appellant's Brief and Appendix. These petitions, and subsequent pleadings filed by him resisting dismissal, made factual showings that earlier filing was *physically impossible*, due to:

(1) **The enormous size of the record,**—more than 700 pages of original record of pleadings, findings, judgment, etc. from the clerk of the District Court, more than 2,000 pages of reporter's trial transcript covering four weeks of trial, and nearly 200 exhibits totaling several thousand pages.

(2) **Prior imperative demands by other federal courts** upon the time of appellant's counsel; and—

(3) **Ill health of appellant's (Petitioner's) counsel, supported by affidavits of his physicians**, showing that he had suffered a physical collapse from overwork during the period allowed by the Court of Appeals for filing Appellant's Brief and Appendix.

Appendix, pp. 63-65, *infra.*

Subsequently, with his petition for rehearing of the dismissal judgment, **appellant tendered and moved for leave to file his printed Appellant's Brief and his printed Appendix**, Volumes I, II and III, containing pages 1 to 572, with seven more volumes to come as fast as the printer could work. He made showing (*supra*) that it could not have been printed and tendered sooner.

Appendix, p. 67, *infra.*

This tendered Brief and Appendix, representing an obvious present expenditure of several thousands of dollars for printing, was rejected by the Court of Appeals. The tendered and rejected Brief and three volumes of the Appendix remain in the hands of that Court's clerk. The appellant-petitioner had the printer suspend work of printing the remaining seven volumes to save possible useless expenditure of several thousand dollars more,—pending outcome of this Petition for Certiorari.

Accordingly, *no jurisdictional question exists below* as the basis for dismissing the appeal, but *only alleged slowness* of the appellant-petitioner in filing his Appellant's Brief and Appendix (which, as aforesaid, were rejected by the Court of Appeals when later tendered).

Petitioner-Appellant, in this situation, contends that there has been an abuse of discretion by the Court of Appeals, and a miscarriage and mal-administration of justice in that Court, which should be remedied by this Court granting this Petition for Certiorari, ordering the Court of Appeals to vacate the judgment of dismissal, to permit the filing of the tendered Appellant's Brief and Appendix, and to proceed with the appeal in due course.

STATEMENT OF THE CASE.

Petitioner, as plaintiff, filed this large equity case in the *Florida state court* at Miami, seeking an accounting and decree for several million dollars, arising out of an alleged joint adventure between him and defendants respondents, *Ben Jaffe* and *Guarantee Reserve Life Insurance Company* (a large, nationwide mail order insurance company, principally owned and controlled by Jaffe) in connection with radio station XEG, which is located at Monterrey, Mexico, but which blankets the United States with radio advertising for mail order insurance and the like (on clear channel 1050).

The defendants removed the case to the United States District Court at Miami on ground of *diversity* and then obtained its transfer to the District Court at Chicago on ground of *forum non conveniens*.

There, a court trial before District Judge Julius J. Hoffman, lasting about *four weeks*, February 5-15 and May 3-15, 1957, resulted in findings, conclusions and judgment in favor of all defendants, that the plaintiff recover nothing, filed on June 19, 1957. Plaintiff filed his notice of appeal on July 19, 1957 and docketed his appeal in the Court of Appeals on October 17, 1957.

Appendix, pp. 4, 14, *infra*.

Since no review is sought on the merits in this Court, only to *obtain* a review on the merits in this Court of Appeals,—the record of the District Court need not be recited here, except for the limited purpose of showing the *size* and *public importance* of the appeal and the resulting need by the appellant for more than a usual amount of time to prepare, print and file his Appellant's

Brief and Appendix. These matters are sufficiently recited in the appellant-petitioner's pleadings in the Court of Appeals, printed in the Appendix hereof. The latter shows:

Appeal Docketed.

October 17, 1957: This plaintiff-appellant-petitioner timely docketed and filed his appeal in the Court of Appeals, as aforesaid. (The *timeliness* of the appeal and *jurisdiction* of the Court of Appeals to review it on the merits was not disputed by the appellees or the Court of Appeals, but was assumed in all the latter's orders).

Appendix, pp. 4, 14, *infra*.

Petitions and Orders for Extension of Time.

November 8, 1957: Appellant filed verified petition to extend time to file his Brief and Appendix to December 31, 1957, because of other necessary litigation imposed upon appellant's counsel in the Court of Appeals for the Fifth Circuit, the Appellate Court of Indiana, and the United States District Court for Puerto Rico. Order by Judge Schnackenberg on November 13, 1957, granted time prayed.

Appendix, pp. 4-6, *infra*.

December 31, 1957: Appellant filed verified petition to extend time to file his Brief and Appendix *to February 15, 1958*, showing: His counsel in this appeal, Jay F. Darlington, was *necessarily absent in Puerto Rico* on a specified case in the United States District Court there which could not be postponed, extending from the latter part of November to December 22, 1957. It was *impossible to delegate* either case to other counsel, because

both were very large and complicated. Said counsel was *the sole attorney* for his client in the Puerto Rico case, and was the *only one sufficiently familiar with this appeal and its large record to be able to prepare the Appellant's Brief and Appendix.* The petition swore that the time requested (to February 15, 1958) "is reasonably necessary at the very minimum."

Appendix, pp. 7-8, *infra.*

Answers opposing the extension were filed by the appellees on January 8, 10 and 11, 1958, arguing that said appellant's counsel should delegate the Brief and Appendix to one of his trial assistants, that he was not "serious" about his appeal, that the appellees "regard" the appeal as "wholly lacking in merit," that appellant's counsel Darlington "regards all his other litigation of greater importance than the instant appeal," etc.

Appendix, pp. 9-14, *infra.*

January 10, 1958: Order (by Judge Finnegan) "that the time for filing appellant's brief be extended *to and including January 31, 1958.*"

Appendix, p. 15, *infra.*

(The above order contained no indication or warning that this was to be the final extension,—as is common practice in that Court and many others).

January 31, 1958: Appellant filed verified petition to extend time to file his Brief and Appendix *to March 17, 1958,* alleging under oath of his counsel, Darlington, in substance:

> 1. Notwithstanding prior extensions, "it has been impossible for his counsel to complete this work within that time."

2. **"Conflicting and inescapable requirements of other federal and state courts upon appellant's counsel, together with ill health** during part of the interval, have made it **impossible** for him (Jay E. Darlington) to complete this task within the time allowed, as more fully detailed below."

3. The nature of this case and the questions to be presented in Appellant's Brief, make it important: (1) from a standpoint of *public policy*, and (2) from a standpoint of *proper administration of justice in the* lower federal courts, that "time technicalities" urged by the appellees be not permitted to "smother" this appeal. (These questions are described in more detail in the *Appendix*, p. 17, *infra*).

4. **"Almost continuously from about November 20 to December 23, 1957,** appellant's said counsel was **necessarily absent** and engaged in important matters, **required by orders of court,** in the United States District Court for Puerto Rico, in the reorganization proceeding of Ronrico Corporation, except for a short interval when he was obliged to return on account of an argument in the Appellate Court of Indiana. **Since returning, ill health** part of the time, due to the flu and **other complications, plus unavoidable demands made upon his time by other state and federal courts,** have made it a **physical impossibility** for appellant's counsel to prepare, print and file Appellant's Brief and Appendix by January 31."

The above paragraph 4 goes on to allege that the so-called "assistant" counsel, who, the appellees argue should write the Appellant's Brief and Appendix **were present during only part of the trial** and are in fact unable to write it or prepare in time to write it, due to the long and complicated character of the

pre-trial proceedings and trial, which makes it impossible for appellant's counsel, Darlington, to delegate the task of preparing the Brief and Appendix.

5. "The pre-trial record is rather long, and the trial record is exceptionally long, consisting of more than 2,000 reporter's transcript pages plus some 200 documentary exhibits totalling several thousand pages. This makes the task a long and complicated one and reasonably requires much more than the usual amount of time."

6. The petition also points out that *the appeal states no judgment below*, because the plaintiff appellant is merely appealing from the District Court's judgment dismissing his action as to one defendant and finding that he recover nothing from the other.

Appendix, pp. 16-19, *infra*.

The appellees again on February 5, 1958 filed answers and motion to dismiss the appeal, similar to their previous ones described at page 9, *supra*, adding that they "have been harassed by this suit since its institution in April of 1953," and that "in the opinion of appellees' counsel as well as the District Court, the case is completely devoid of merit." The same criticism of appellant's counsel, Darlington, is repeated at length.

Appendix, pp. 21-27, *infra*.

(All of appellant's petitions for time, and all his other factual pleadings in the Court of Appeals, such as his Response to the motions to dismiss, infra, are sworn to But none of the appellees' answers or motions to dismiss are sworn to in fact, the appended affidavits being only as to mail service. **Neither do any of the appellees' pleadings deny the large and complicated nature of the record and the appeal,** as described in appellant's pleadings.)

February 12, 1958: Appellant filed a Response to the motions to dismiss contained in the above answers opposing his pending petition for extension of time (which had been filed on January 31, 1958, see pages 8-10, *supra*). His Response *incorporated by reference the sworn allegations* of his pending petition for extension as showing that "good and sufficient reason exists for the previous and present delay of appellant in filing Appellant's Brief and Appendix, due to the *size* of the record, the *nature* of the case, and *the practical exigencies confronting* appellant's counsel."

Appendix, pp. 29-30, *infra*.

Order Denying Time, and Denying Motions to Dismiss.

February 14, 1958: Order (by Judge Finnegan only):

"that appellant's petition for additional time for filing his brief and appendix be, and same is hereby, Denied," and—

"that the motions of certain appellees to dismiss the appeal be, and same are hereby Denied, without prejudice."

Appendix, p. 30, *infra*.

Motion to Dismiss Appeal.

February 28, 1958: Another motion was filed by the appellees to dismiss the appeal, alleging that the allowed time for filing Appellant's Brief and Appendix had expired January 31, 1958, that the appellant "*now has no standing* in this Court to file his brief and appendix", and alleging that "appellees have been harassed by this litigation for nearly five years."

Appendix, pp. 31-32, *infra*.

Appellant's Answer to Motions to Dismiss.

March 17, 1958: Appellant filed his sworn Answer to the above motion to dismiss the appeal, showing:

1. The defendants-appellees themselves caused the major part of the five years "delay" since commencement of the action in 1953, by their obtaining transfer from the District Court in Miami to Chicago on *forum non conveniens*, by their motions to dismiss the action, by their motions for summary judgment, and most of all—

> "*their delay of seventeen months in filing their answers*, from September 14, 1954 to February 20, 1956, *an accommodation which they sought and obtained from the plaintiff-appellant by successive stipulations.*"

2. Appellant's counsel repeated his previous sworn statements about the compulsory commitments forced upon him in other courts beginning in November, 1957, *plus* the fact that more recently he "*was necessarily absent in Puerto Rico from February 16 to March 1, 1958*" in the *trial* of a specified civil case in the United States District Court there,—"said civil trial having been set by an *order* made about *ten months earlier*" (in other words long prior to this appeal). He repeats his prior sworn showing of "*an interval of ill health the middle part of January*" 1958.

3. "Since March 1, 1958, appellant's said counsel, Jay E. Darlington, *has devoted all possible time to the preparation of Appellant's Brief*, which he proposes to complete and tender with a petition for leave to file at the earliest possible date. Sufficient manuscript

material is *now ready to go to the printer* to make an estimated 200 printed pages of brief and appendix. *He estimates that the Appellant's Brief and Appendix can be tendered for filing about March 31, 1958.*

4. **"As an indication of the good faith efforts that have been and are being made by appellant's said counsel to complete this brief and appendix, this current work thereon is being done at considerable sacrifice and some jeopardy to his health, consisting of the fact that it is being done contrary to his doctor's orders and deferring two days of medical check-up until the brief is completed.**

5. "*The record is very large and complicated*, and, as shown in Exhibit B hereof, the *questions* to be presented are of such character as to require this Court's consideration of much of the clerk's original file, *practically all of the oral testimony*, and *many of the exhibits*, both admitted and rejected. The record includes:

(a) *Clerk's original file of 740 pages.*

(b) *Reporter's transcript of testimony and court proceedings, 2357 pages.*

(c) *192 exhibits, comprising several thousand pages of material.*

6-8. The above Answer then points out that *as a matter of law*, the existing lack of an Appellant's Brief and Appendix on file is *not jurisdictional*, that it does not preclude the Court of Appeals from *receiving the proposed tender of the Brief and Appendix*, which appellant's counsel was striving to make by March 31, 1958 (see pars. 4 and 5, *supra*), and the Supreme Court's **Rule 73a of Civil Procedure** plainly provides:

"*Failure of the appellant to take any further steps* (after filing notice of appeal) to secure the review of the judgment appealed from does not affect the validity of the appeal".

Appendix, pp. 33-37, *infra*.

First Order Dismissing Appeal (3-19-58).

On March 19, 1958, two days after the appellant's above answer, the Court of Appeals frustrated and cut off the appellant's announced intent to tender his Appellant's Brief and Appendix (see page 13, pars. 3 and 4, supra) by entering an Order (by Judges Finnegan and Parkinson):

"that the motion of the appellees to dismiss the appeal be granted, and this appeal is hereby dismissed at costs of the appellant."

Appendix, pp. 42-43, *infra*.

(Certain argumentative recitals in the above order, preceding the part quoted, seeking to lay blame on the appellant, are considered under "Argument," p. 20, *infra*.)

Petition for Rehearing of the above order was timely filed by appellant on April 3, 1958. Its par. (1) raised the *legal* question of whether or not Judges Finnegan and Parkinson (see *supra*), constitute a lawfully constituted Division of the Court of Appeals, for the purpose of rendering the above final judgment, under **28 U.S.C. 46.**

The remaining paragraphs of this Petition for Rehearing contended that this judgment of dismissal **operated as a miscarriage of justice**, under the circumstances shown by the preceding record of the Court of Appeals, and

set forth in appellant's Petitions for time and in his Answer resisting dismissal, above set forth.

Appendix, pp. 44-50, *infra*.

Answer to the above Petition for Rehearing was filed by the appellees on April 11, 1958, contending that under "the Federal rules" and the rules of the Court of Appeals, appellant had not been "diligent" in prosecuting his appeal, etc.

Appendix, pp. 52-54, *infra*.

Order of April 16, 1958 Denying Rehearing en Banc.

On April 16, 1958, an order bearing the names of five Judges of the Court of Appeals, reads:

> "The petition of appellant for a rehearing en banc of the order dismissing the appeal herein, entered by this Court on March 19, 1958, be, and the same is hereby, Denied."

Appendix, p. 55.

Note: The intent of the above order appears on its face to be a denial of the Petition for Rehearing, which had included in its prayer a request for rehearing en banc (Appendix, p. 50, *infra*), but doubt is cast on that interpretation by the Order following:

Order of April 16, 1958 Vacating Dismissal Order of March 19, and Again Dismissing the Appeal.

Immediately following the above first order of the *five* judges, on the same day, follows the following Order bearing the names of *three* of the five. After a short

historical recital of prior proceedings in the Court of Appeals, it recites that:

> "Whereas, *a division* of this Court consisting of Judges Duffy, Schnackenberg and Hastings, *has been duly designated* to consider all questions raised by said petition for rehearing, and being fully advised.
>
> * * *
>
> **"It is Further Ordered, that the order of this Court dated March 19, 1958 dismissing the appeal herein be and the same is vacated and set aside.**
>
> * * *
>
> **"It is Ordered, that the motions to dismiss the appeal herein be granted, and that this appeal be and is hereby dismissed with costs to the appellant."** (Our emphasis).

Appendix, pp. 56-58, *infra*.

Petition for Rehearing of Order of April 16, 1958.

On May 2, 1958, by leave, appellant filed his Petition for Rehearing of the above Order of April 16, contending that:

> (1) Vacating the prior Order of March 19 amounts to an implied but unexplained *confession of error* therein, by the Court; and also that the Court erred in failing to grant or notice the prayer of his *preceding* Petition for Rehearing, for oral argument on the entire question of dismissal.
>
> (2) That the factual recital in the Order of April 16, 1958, blaming the appellant for alleged delays
>
> "is grossly inaccurate and misleading in fact, because it *omits all the facts* set forth by the

appellant in his Petitions for time, and in his Answer for the Motion for Dismissal, *showing good cause for the delays* recited in the Order."

(3) *Making more specific the previous general allegations of the ill health of appellant's counsel,* repeatedly contained in his Petitions for time and in his Answer to the Motion for Dismissal,—

"there is being filed herewith the affidavits of the *physicians* for appellant's counsel, showing the *physical impossibility* of complying with the previous requirements of this Court."
Appendix, pp. 60-62, *infra.*

Said physicians' affidavits, tendered by appellant on May 5, 1958, and filed by leave on May 22, 1958, recite, in part, that appellant's counsel, Darlington—

"collapsed while working at his offices on January 12, 1958, and was found lying unconscious on the floor and removed to a hospital for treatment. He recovered and was later examined in my office on January 16, 1958, at which time it was my opinion that the patient was exhausted from overwork and was advised to slow down. * * *

"* * * it is also my opinion that said condition of overwork and exhaustion above described had been developing for a period of several months before said collapse and reached an acute state culminating in said collapse on January 12, 1958." (Our emphasis).

Appendix, pp. 63-65, *infra.*

Appellant's Tender of Brief and Appendix.

On May 6, 1958, while appellant's above Petition for Rehearing, and supporting physicians' affidavits were pending, appellant, by his said counsel, Darlington, tendered and moved for leave to file, his printed Appellant's Brief, and the first printed Volumes of his Appendix,—the remaining Volumes (ten in total number, in about 1500 more pages) to come as fast as the printer could print them.

(A total of 3 Volumes had arrived at the office of the Clerk of the Court of Appeals up to the time of the Order, *infra*, was made *refusing the tender*. A copy of these tendered 3 Volumes and a copy of the tendered printed Brief have been certified up as tendered but unfiled documents along with the Court of Appeals' *filed* record.)

Appendix, pp. 67-68, *infra*.

The appellees, on May 8, 1958, filled an Answer opposing the tender of affidavits of the physicians, opposing the Petition for Rehearing, and reiterating their prior contentions.

Appendix, pp. 69-72, *infra*.

Order of May 23, 1958 Denying Rehearing, Refusing Oral Argument, and Refusing Tendered Brief and Appendix.

After the filing of the above physicians' affidavits, but with no mention thereof, the Court, on May 23, 1958, entered an Order bearing the names of all five Judges "en banc", which, after preliminary recitals, states:

And now the court en banc denies appellant's motion for oral argument on his petition for rehearing and further denies appellant's petition for rehearing and reconsideration of this court's order and judgment of April 16, 1958 dismissing this appeal.

Appellant's tender and motion (filed May 6, 1958) for leave to file his printed appellant's brief and appendix is now considered by the court en banc, and it is ordered by the court en banc that such motion for leave to file appellant's printed brief and appendix be denied. (Our bold face emphasis.)

Appendix, pp. 74-75, *infra*.

ARGUMENT—REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

Petitioner respectfully urges that the foregoing record and Orders of the Court of Appeals constitute a serious miscarriage of justice, and an abuse of that Court's discretion and functions, which need attention and remedy by the Supreme Court, both in justice to this Petitioner, and in the interest of due adminisitration of justice in the Court of Appeals.

A.

It is needless, and is a reflection upon the federal judiciary, for a situation like this to exist in a Court of Appeals,—where an appellant's counsel has to fight (unsuccessfully) for time to do his work in a large and important case, while the appellees, with the Court joining them, berate the appellant's counsel for his alleged "lack of diligence",—supporting these unjust charges by *ignoring* the repeatedly sworn facts in his pleadings, and even ignoring the affidavits of his physicians.

That this is true, is shown by *comparing* the face of the *Orders* with the preceding *sworn pleadings* of the appellant (and there was no counter-proof by counter-affidavits, or by the record, or otherwise).

For instance, the first dismissal order, entered on March 19, 1958, recites as an excuse for the dismissal:

> "It further appearing, from the answer of the appellant heretofor filed on March 17, 1958, that work on appellant's brief was not even commenced until March 1, 1958,"
>
> Appendix, p. 43, *infra*.

But that unfair, misleading, and somewhat frivolous reproach (as if that alleged starting date *ipso facto* put the appellant beyond the pale of the law), totally fails to mention the strong and detailed factual showing in that Answer of March 17,—that preceding ill health, the demands of the courts upon appellant's counsel, and particularly his *compulsory absence on a trial* in the United States District Court for Pureto Rico *from January 16 to March 1*, had made it impossible to start work on the Brief and Appendix until March 1, but the work *was now progressing with all possible speed; even to the point of sacrificing the health of appellant's counsel to hasten the filing of the Brief.*

This Petition, pp. 12-13 *supra.*

Appendix, pp. 34-35, *infra.*

Again, the second order, entered on April 16, 1958, *while remaining entirely silent upon the above factual showing made in appellant's Answer of March 17*, makes the following platitudinous recital, which, coupled with its said silence on the essential facts, gives an entirely false impression of the true situation:

> "It being essential for the orderly and prompt disposal of matters pending before this Court that counsel and litigants adhere to the rules limiting the time for filing briefs, appendices, motions and other papers in pending cases, and it appearing further that *the Attorney* for appellant herein has had an adequate *period* of time within which to comply with said rules, and had insufficient reasons for not doing so," (our italics).

Appendix, pp. 33-37, 58, *infra.*

The public, the bar, or a reviewing court, reading the two recitals above quoted from the Orders of March 19 and April 16, 1958, would, we believe, be entirely and unjustly misled, to the detriment of appellant's counsel, until the true facts are laboriously dug out of this record and exposed. This type of presentation is bad even in a partisan argument. It should not occur in a Court of Appeals' final order, or any order.

B.

But still more unjust, is the apparent determination exhibited in the above Orders of March 19 and April 16, 1958 to circumvent and thwart any attempt by the appellant to get his Brief and Appendix on file,—by dismissing the appeal on the eve of the expected filing.

For instance, appellant's Answer, above discussed under A, filed on March 17, stated that appellant's counsel was striving to complete his Brief and Appendix with all possible effort, and—

"He (counsel) estimates that the Appellant's Brief and Appendix *can be tendered for filing about March 31, 1958.*"

This Petition, p. 13, par. 3, *supra.*
Appendix, p. 35, par. 3, *infra.*

So what did the Court of Appeal do, upon receiving the above Answer on March 17, 1958?

It entered the above order on March 19th, two days later, dismissing the appeal, thereby circumventing and thwarting the proposed filing of the Brief and Appendix (since obviously they could not be filed in a dismissed appeal). No reason was given by the Court of Appeals.

nor apparently could be given for this arbitrary action, the existence of which is concealed in the Order.

The Court of Appeals, on April 16, 1958, *found itself confronted with the necessity of vacating the above dismissal Order of March 19th* (apparently because the Order had been entered by only two random Judges and not by a duly constituted *Division* of the Court, as required by **28 U.S.C. 46** for final judgments as had been pointed out in appellant's Petition for Rehearing, filed April 3, 1958).

This Petition, p. 14, par. 1, *supra.*
Appendix, p. 44, par. 1, *infra.*

Again, what did the Court of Appeals do?

On April 16, it vacated the defective Order of March 19, and again dismissed the appeal in the same order and same breath,—this time by an elaborately and specially constituted "Division"—thereby again cutting off any attempt by the appellant to tender for filing his Brief and Appendix at a time when the appeal was not in a "dismissed" status.

This Petition, p. 14, *supra.*
Appendix, p. 57 bottom, p. 58 top, *infra.*

Finally, when the appellant, on May 2, filed his Petition for Rehearing of the above Order of April 16, and *tendered* his Brief and the first printed Volumes of his Appendix on May 6, *while the Petition for Rehearing was yet pending*, the Court, again in the same Order, *first* denied the Petition for Rehearing, and then in the next paragraph refused the tendered Brief and Appendix.

This Petition, p. 19, *supra.*
Appendix, pp. 67, 74-75, *infra.*

C.

Under the circumstances shown by the Court of Appeals' record, — the hue and cry of the appellees, joined in by the Court, about the alleged "delay" in this appeal, was sham.

The appeal actually was much "younger" than most comparable large appeals in *that* Court of Appeals, and in other similar Courts, (as this Court judicially knows), when it was ruthlessly smothered and then thrown out for alleged "delay" in filing the laborious Appellant's Brief and the extremely large and laborious printed Appendix of about 2,000 pages.

This admittedly large appeal was docketed on October 17, 1957. Then:

> *Less than four months* after docketing, came the Order of February 10, 1958, denying further time (and apparently further right) to file the Brief and Appendix.
>
> Appendix, p. 30, *infra*.
>
> *Only five months* after docketing, came the first dismissal Order, of March 19, 1958.
>
> Appendix, pp. 42-43, *infra*.

(Thereby, an announced intent of the appellant to file Brief and Appendix by about March 31, 1958, twelve days later, was ruthlessly cut off.)

D.

Apart from his compulsory commitments in other Courts, and his ill health, Appellant-Petitioner's counsel was kept so busy from the end of January 1958, preparing Answers to Motions to Dismiss, and preparing Petitions for Rehearing of dismissal Orders, that he had little time to do constructive work on his Appellant's Brief and Appendix.

Neither is there any logic or fairness in the sham argument repeatedly urged in the appellees' pleadings, though not mentioned in the Court's Orders,—that appellant's counsel, Darlington, should have turned over the preparation of the Brief and Appendix to some "assistant" counsel, unfamiliar therewith, simply because they appeared to some extent in the pre-trial or trial record in the District Court.

This Court judicially knows that it is a frequent thing in large civil cases of this type, for several attorneys to appear on the record for a party at various stages, some even participating in certain aspects of the District Court's pre-trial or trial proceedings,—and yet they may be entirely unable or unprepared to compose a complicated Appellant's Brief and Appendix in the appeal following a long trial. This situation was abundantly shown in repeated *sworn* pleadings filed by this appellant-Petitioner in the Court of Appeals, showing that *none* the so-called assistants were present at more that *part* of the trial (Mr. Julian and Mr. Galendo), that another merely lent his name as local counsel to accept service and was not present at any part of the trial (Mr. Jeffers), *and that in fact said Darlington, who had handled practically all of the pre-trial and trial of the case, was the*

only one sufficiently familiar with the case and the lower record to prepare an adequate Appellant's Brief and Appendix.

Petition, pp. 9-10, *supra.*
Appendix, pp. 4, 18, 34, *infra.*

It is not lack of diligence for an attorney, or a Judge for that matter, to find himself swamped with work or in poor health for a time, and necessarily delayed.

Nor would it be sound practice to sanction this doctrine that the trial or appeal of a complicated case must be turned over to some assistant, or even a stranger, in such a case. This would aid the *adversary*, and might aid courts bent on getting *rid* of cases or appeals *by coercive dismissals*, but it certainly would not aid courts seeking to perform their basic function of determining cases on their merits, after a full and fair hearing.

Conclusion.

Wherefore, the Petitioner respectfully prays this Court to grant its writ of certiorari and review the said judgment of dismissal of the Court of Appeals, and that thereupon, said judgment may be reversed with directions to the Court of Appeals to vacate same and to give him an opportunity to file his Appellant's Brief and Appendix, and to proceed with his appeal in due course; and he prays for all further just and proper relief.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Petitioner.

Court of Appeals' Rule 16—Form and Contents of Appendices and Briefs.

(a) *Time of Filing; Printing.* On all appeals or petitions for review to be fully heard by the court the appellant or petitioner shall file his printed brief and, *instead* of a printed transcript of the record, his *printed appendix* thereto within 30 days after the record is filed; the appellee or respondent shall file his brief, with appendix, if any, within 30 days thereafter; and if the appellant or petitioner then chooses to file a reply brief, he shall file it, with appendix, if any, within 15 days thereafter. *Where an appendix is voluminous it may be bound separately* from the brief which it accompanies. Either party, if he so desires, may have the appendix printed under the direction of the clerk, but shall advance the cost thereof to the clerk. Except where permission has been given, the briefs and appendices shall be printed as provided in subdivision (f) of this rule and shall not be typewritten; but the court or a judge thereof may dispense with printing on motion of a party or on its own motion at any time.

(b) *Contents of Appendices.* The appendix to the main brief of the appellant or petitioner shall contain the judgment, decree, or order appealed from or sought to be reviewed or enforced (excluding the caption and purely formal parts); the opinion, findings of fact and conclusions of law of the court or administrative agency, or the charge of the court, if any; the notice of appeal or petition for review or for enforcement, *and such other parts of the record as are deemed necessary by the appellant* or

petitioner fairly to present the issues on appeal. The material thus included shall be preceded by a statement either in summary form or by quotation of the appropriate docket entries in the tribunal below, which shall show the time and manner of institution of the proceeding below and all steps taken therein by the tribunal, with dates and appropriate description, so far as applicable to the matters under appeal. The appendix of the appellee or respondent shall set forth any other parts of the record which he thinks similarly necessary. And the appendix to the reply brief shall contain any further parts of the record which the appellant or petitioner thinks have become necessary by the parts printed by the appellee or respondent. In all appendices, the evidence may be abstracted or reduced to narrative form. If appellant or petitioner raises a question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment, he shall include in the appendix all evidence pertinent thereto.

(c) *Form of Appendices.* Each appendix shall contain an index of the names of the witnesses and of the papers printed, and the printed pages shall contain references to those pages of the record on file from which they have been copied. In the case of testimony the fact that parts have been omitted shall be indicated by asterisks. The portions of the record printed in the appendices shall be arranged in chronological order and shall preferably be printed as separate documents. The appendices shall not be counted as pages of the brief. It is expected that the parties will not indulge in unnecessary or repetitious printing, having in mind the fact that the record is always available to the court for reference or examination. Infractions of this rule may be penalized by the denial or award of costs. Upon the backbone portion of the cover

of each appendix the number assigned to the case in this court shall be printed. (Our emphasis).

* * *

Court of Appeals' Rule 17—Briefs.

(a) *Contents of Appellant's Brief.* The brief for appellant or petitioner shall contain, in the following order, an index, list of authorities cited, statement of facts, summary of argument, the contested issues, the propositions of law relied upon and the argument. The index shall give page references to the subject matter covered by the brief. The summary of the argument shall contain a brief synopsis of the argument. The list of authorities shall be arranged alphabetically, and opposite each citation shall appear the page or pages where the authority appears in the brief.

(1) *Statement of Facts.* This statement shall first state briefly and concisely the nature of the case and its disposition in the district court, such as follows: * * *

Then shall follow a concise statement of the facts, without argument or comment thereon, with the pages of the printed appendix or record where the recited facts appear.

(2) *Contested Issues.* Under this title shall be briefly stated the contested issues.

(3) *Propositions of Law and Citation of Cases.* The statement of propositions of law relied upon preceding the argument shall include citation of authorities in support of each proposition. * * *

(4) *Argument.* The argument shall include a clear statement of the points of law or facts to be discussed, with a reference to the pages of the record and appendix and the authorities relied upon in support of each point. When a statute is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. (Our emphasis).

Appendix—Appellant's Petition for Time to File Brief and Appendix

(Captions omitted throughout)

PETITION FOR ADDITIONAL TIME TO FILE APPELLANT'S BRIEF AND APPENDIX.

Filed Nov. 8, 1957)

Comes now the plaintiff-appellant and respectfully petitions that the time for filing his Appellant's Brief herein be extended from November 16, 1957 to and including December 31, 1957, and shows:

1. This appeal was docketed and the record was filed in this court on October 17, 1957, so the time for Appellant's Brief would expire November 16, 1957.

2. It will be impossible for appellant's counsel, Jay E. Darlington, who is solely charged with the preparation of said brief, and who is the only one sufficiently familiar with the appeal, to be able to prepare same within that time, without fault on the part of appellant or his counsel, and after giving all possible priority to the brief:

(a) Because of the large record in the case (consisting of more than 2,000 pages of reporter's transcript of trial testimony and proceedings, plus nearly 200 exhibits comprising several thousand additional pages), and also because numerous important questions of fact and law need to be presented in Appellant's Brief.

(b) And also because appellant's said counsel, Jay E. Darlington, is also required to devote a considerable part of the time between the present date and December 31, 1957 to the briefing and related matters in other large appeals of comparable size and nature, including No. 16817 in the United States Court of Appeals for the Fifth Circuit, Peckham v.

Appendix—Appellant's Petition for Time to File Brief and Appendix

Family Loan Co. et al. and No. 19069 in the Appellate Court of Indiana, Rooney v. City of East Chicago et al, both docketed earlier than this appeal, plus other urgent matters in the trial courts, including an important hearing in the matter of reorganizing Ronrico Corporation, Bankruptcy No. 2146, in the United States District Court for the District of Puerto Rico.

3. By reason of the aforesaid facts, it will reasonably require at least the amount of time herein requested for the preparation of Appellant's Brief in this appeal (and wherever the term "Appellant's Brief" is used in this petition, it includes also the "Appendix" thereof).

Wherefore, plaintiff-appellant respectfully prays that the time for filing his Appellant's Brief and Appendix thereof be extended to and including December 31, 1957.

/s/ Jay E. Darlington
Attorney for Plaintiff-Appellant

State of Indiana)
County of Lake) ss.

Jay E. Darlington, being first duly sworn, says the fact allegations in the above petition are true.

Affiant further says that on November 8, 1957, he mailed true copies of this petition to counsel of record for all defendant-appellees: Mr. Claude Roth and Mr. Charles Stein, 231 S. LaSalle, Mr. Harold T. Bere, 33 N. LaSalle and Mr. Hubert Will, 33 N. LaSalle, all of Chicago, Ill. (Jurat of notary appended)

/s/ Jay E. Darlington

Tr. pp. 2-3.

Appendix—Order

Wednesday, November 13, 1957

Before

Elmer J. Schnackenberg, Circuit Judge

WILLIAM G. BURNS, etc.,
Plaintiff-Appellant,
No. 12158 vs.
BEN JAFFEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of counsel for plaintiff-appellant, counsel for defendants-appellees not objecting thereto,

It Is Ordered that the time for filing brief and appendix for plaintiff-appellant be extended to and including December 31, 1957.

Tr. p. 4.

Appendix—Appellant's Petition for Time to File Brief and Appendix.

APPELLANT'S PETITION FOR ADDITIONAL EXTENSION OF TIME TO FILE APPELLANT'S BRIEF.

(Filed Dec. 31, 1957)

Comes now the appellant and respectfully petitions that the time for filing his Appellant's Brief herein be extended from December 31, 1957 to and including February 15, 1958, and shows:

1. This appeal was docketed and the record filed on October 17, 1957, and the extended time for Appellant's Brief expires December 31, 1957.

2. Notwithstanding diligent efforts on the part of his counsel, Jay E. Darlington, who is solely charged with the preparation of Appellant's Brief and is solely familiar enough with the details of the long record to do this task, it has been impossible to prepare and file it within the time allowed, *due to the following unavoidable circumstances and burdens encountered by said attorney, among others:*

3. *Almost continuously* since the appeal was docketed, appellant's said counsel has been obliged to devote nearly all his time to urgent litigation in the *United States District Court of Puerto Rico*, consisting of a succession of hearings in Bankruptcy No. 2146 in the corporate reorganization of *Ronrico Corporation* (the well-known rum concern). These hearings came on pursuant to proceedings *preceding* this appeal and *could not be postponed.* Appellant's counsel here, was and is *sole counsel* for an important party in *that* reorganization proceeding concerning an interest exceeding $1,000,000.00, and due to the long and complex nature of the litigation, *that* task *could not be delegated.* Likewise, it has been and will be *impossible* for appellant's counsel *to delegate* the prepara-

tion of Appellant's Brief in *this* appeal for similar reasons as above explained. More specifically, appellant's counsel has been obliged to make several trips to Puerto Rico since this appeal was docketed, and he was obliged to be there *continuously from about November 25 until December 22, 1957*, except for a return of about three or four days on urgent matters.

4. *Due to the large size of the record in this appeal*, consisting of several thousand pages of reporter's transcript and some 200 exhibits, many of them long, some admitted and some offered and rejected, but all up for consideration,—*the time and labor in preparing Appellant's Brief is exceptionally great*, and the time herein *requested* is reasonably necessary *at the very minimum*. The decision below consisted of findings, conclusions and judgment against plaintiff, dismissing his action as to one defendant and finding against him as to the others. *Hence, no judgment is being stayed by the appeal*, and no reasonable hardship is imposed on the defendants-appellees.

Wherefore, Plaintiff-appellant prays that the time for filing his Appellant's Brief be extended from December 31, 1957 *to and including February 15, 1958*. (Our italics.)

/s/ Jay E. Darlington
Attorney for Plaintiff-Appellant

State of Indiana)
County of Lake)

Jay E. Darlington, being first duly sworn, says the above petition is true in substance and in fact. (Our italics.)

(Allegations of service follow.)
(Jurat of Notary)
Tr. pp. 5-7.

Appendix—Answer of Appellees Jaffe Opposing Extension, and Motion to Dismiss.

ANSWER OF BEN JAFFE AND EUGENE JAFFE, APPELLEES, OPPOSING APPELLANT'S PETITION FOR AN ADDITIONAL EXTENSION OF TIME TO FILE BRIEF AND MOTION TO DISMISS APPEAL.

(Filed Jan. 8, 1958)

Appellees, Ben Jaffe and Eugene Jaffe, oppose the request made in the petition of the plaintiff-appellant for an additional extension of time to file his brief and appendix in this Court, and for the reasons hereinafter stated move that the appeal be dismissed:

1. This appeal was docketed in this Court on October 17, 1957. Under the rules, Appellant's brief and appendix formally would have been required to be filed on November 17, 1957. Pursuant to motion and petition and without objection on the part of defendants-appellees, this Court, on November 13, 1957, entered an order extending the time for filing appellant's brief and appendix to and including December 31, 1957. Neither the brief nor the appendix was filed within that time. Without obtaining an order from this Court on proper application for an extension prior to the expiration date of December 31, 1957, appellant filed on December 31st another petition for an additional extension to and including February 15, 1958. It was not until January 2, 1958 that appellees were notified that appellant had petitioned for a further extension. Consequently, as the record now stands, appellant is in default of this Court's order of November 13, 1957. No justifiable or adequate reasons or good cause have been shown to excuse this neglect. Appellant's counsel, as an officer of this Court, was charged with the

duty of obeying this Court's order and of making his other asserted engagements conform therewith.

2. In the first petition for an extension to December 31, 1957 and in the present application to extend appellant's time to February 15, 1958, the principal reasons given are preoccupation in other litigated matters by Mr. Jay E. Darlington, appellant's attorney, and that Mr. Darlington is solely charged with the duty of preparing the brief and appendix. It is also asserted that the said Darlington is the only counsel sufficiently familiar with the appeal to prepare the documents. We shall now demonstrate that these reasons, under the cases hereinafter cited and in light of the existing facts with respect to this appeal, do not constitute adequate and sufficient grounds to make out a case of excusable neglect:

(a) Mr. Darlington was assisted on the trial of this cause, as the record shows, by two other attorneys, Mr. Leo S. Julian of the Florida bar and Mr. Mayo Galindo of the Texas bar. In addition thereto, Mr. John R. Jeffers of the Illinois bar was also an attorney of record below, as he is in this Court. Regardless, therefore, of Mr. Darlington's preoccupations and travels, he has had available the benefit of the services of three additional counsel, at least two of whom are familiar with this litigation. This suit was initially filed on appellant's behalf by Mr. Julian in the state court of Florida from which it was removed to the United States District Court in Florida and then subsequently transferred to the District Court at Chicago, Illinois.

(b) We are confident the sequence of events in connection with this appeal, hereinafter set forth, will reveal that if appellant was serious about prosecuting his appeal (which we regard as wholly lacking in

merit), he has had more than ample time to do so despite the assertions in his two petitions for extensions. It is apparent from the petitions filed for the extensions that Mr. Darlington regards all of his other litigation of greater importance than the instant appeal. If a case is of such importance that an appeal is warranted, the appeal is worthy of the attention and time required for a reasonably early disposition thereof, particularly where more than one lawyer is available. For instance, in the first petition for an extension to December 31, 1957, appellant urged as an excuse, Mr. Darlington's involvement in the Ronrico Corporation bankruptcy matter pending in the Federal Court for the Disfriet. of Puerto Rico, among other litigation. The present petition for a further extension again adverts to Mr. Darlington's engagement in that same proceeding. As of January 9, 1958, eighty-four (84) days have elapsed since the docketing of the appeal here without the filing of any brief or appendix. It would seem to be an inescapable conclusion that appellant is neither serious about a review nor interested in the disposition of this case.

(c) The authorities dealing with a motion to file and docket a record after the time has expired are equally applicable here. This Court has stated that its rules are expected to be followed. In re Gammill, 129 F. 2d 501, 502 (C.C.A. 7th). In Gammill there was, as there is here, more than one counsel and, as the court pointed out, the record indicated that appellant had been represented by three co-counsel and no reason was shown why, if one were ill, the others could not carry out the necessary steps in the cause.

Appendix—Answer of Appellees Jaffe Opposing Extension, and Motion to Dismiss

In denying a motion for leave to docket an appeal, this court said:

> "* * it is clear that the rules are expected to be followed, and that unless reasons satisfactory to the court are advanced as a basis for special relief from their provisions, it will take such action as it deems appropriate. In this case, such action would be denial of leave to docket the appeal, which leave is required by Rule 11(2) of this court * * *."

To the same effect are Tucker Products Corporation v. Helms, et al., 171 F. 2d 126 (C.C.A. 9th) and Maghan v. Young, et al., 154 F. 2d 13 (Court of Appeals, District of Columbia. In Tucker the court said:

> "We agree that the appeal should be dismissed. The contention of plaintiff and appellant is that its attorneys, officers of this court, may engage in other litigation and that this 'preoccupation in other matters' relieves them of the preparation and presentation of an affidavit and motion for the extension of time provided in our Rule 73 to be made prior to the expiration of the time fixed by the district court under Rule 73 * * *.
>
> "We do not regard such preoccupation in other litigation as a reasonable ground for neglect of the duties of officers of this court. (Citing Maghan v. Young)" (Underscoring ours)

In Maghan v. Young, supra, it was stated:

> "The explanation of appellant's neglect is that appellant's counsel was professionally engaged in attending to other matters. We think this is not an adequate reason to justify our exercise of discretion."

Appendix—Answer of Appellees Jaffe Opposing Extension, and Motion to Dismiss

In 3 American Jurisprudence, Sec. 781, p. 338, it is stated:

> "If an appellant neglects to file a brief within the time fixed by rule of court, without obtaining an extension of time, his appeal may be dismissed or the judgment affirmed, unless there is a sufficient excuse shown."

Certainly no sufficient excuse is shown in the petition filed herein for the failure to obey the order of the Court of November 13, 1957.

3. Appellant's contention that no reasonable hardship is imposed on the appellees is without merit. Appellees and their counsel are of the opinion that appellant's suit is vexatious and without foundation and the findings of fact and conclusions of law entered by the District Court attest to such a conclusion. We respectfully refer the Court to said findings and conclusions. It is also respectfully submitted (a) that appellant has failed to make a timely application for an extension inasmuch as his brief was due on December 31, 1957, and (b) that appellant's petition fails to make an adequate showing of cause or of excusable neglect for the allowance thereof.

Wherefore, appellees pray that appellant's petition for an additional extension of time be denied and that this appeal be dismissed at appellant's costs.

/s Claude A. Roth
/s Charles D. Stein
Attorneys for Appellees,
Ben Jaffe and Eugene Jaffe

Gotlieb and Schwartz
231 South La Salle Street
Chicago 4, Illinois
Of Counsel

Appendix—Answer of Appellees Jaffe Opposing Extension, and Motion to Dismiss

(Appended to above answer)

Time Schedule Since Entry of Judgment

(a) Findings of Fact and Conclusions of Law entered by District Court on June 19, 1957;

(b) Notice of Appeal and Appeal bond filed on July 19, 1957;

(c) On August 23, 1957, appellant moves for an extension of the time for docketing this appeal to October 17, 1957, the full ninety (90) days permitted;

(d) On October 17, 1957, appellant dockets cause in this Court;

(e) On November 13, 1957, appellant moves for an extension of the time to and including December 31, 1957, within which to file brief and appendix, which extension was allowed by this Court, but appellant failed to file his papers within the time allowed;

(f) On December 31, 1957, appellant filed his motion for an additional extension of time to file brief and appendix to February 15, 1958, and it was not until January 2, 1958, when these appellees were served, at which time appellant was in default.

(Affidavit of service appended.)

Tr. pp. 8-16.

Note: Similar answers and motions to dismiss, filed by appellees *Schwartz* and *Guarantee Reserve Life Insurance Company*, on Jan. 9 and 11, 1957, are omitted here, as being substantially covered by the foregoing answer and motion.

Tr. pp. 17-24.

Appendix—Order

Friday, January 10, 1958

Before

Philip J. Finnegan, Circuit Judge

WILLIAM G. BURNS, etc., Plaintiff-Appellant, vs. BEN JAFFEE, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 2158

On consideration of the petition of counsel for appellant, and answers thereto of counsel for appellees,

It Is Ordered that the time for filing appellant's brief be extended *to and including January 31, 1958* (Our italics)

Tr. p. 25.

Appendix—Appellant's Petition for Time to File Brief and Appendix

APPELLANT'S PETITION FOR ADDITIONAL TIME TO FILE APPELLANT'S BRIEF AND APPENDIX.

(Filed Jan. 31, 1958)

Comes now the appellant and respectfully petitions that the time for filing his Appellant's Brief and Appendix *be extended from January 31, 1958, to and including March 17, 1958,* and shows:

1. The record, consisting of the original clerk's file below, trial transcript of proceedings and evidence, and original exhibits, was filed and appeal docketed on October 17, 1957. Appellant has had previous extensions for filing his Appellant's Brief and transcript to January 31, but for reasons stated in previous petitions and in this one, *it has been impossible for his counsel to complete this work within that time.*

2. *Conflicting and inescapable requirements of other federal and state courts upon appellant's counsel, together with ill health* during part of the interval, have made it impossible for him (Jay E. Darlington) to complete this task within the time allowed, as more fully detailed below.

3. In addition to this inability of appellant's counsel, the *nature* of this case, and the *questions* to be presented in Appellant's Brief on appeal, made it *important*: (1) from a standpoint of *public policy*, and (2) from a standpoint of *proper administration of justice in the lower federal courts*, that appellant's counsel be given adequate opportunity to present these questions on appeal, rather than dismissing the appeal on *time technicalities*, as suggested in the appellees' previous objections to the last extension of time, *which would have the effect of smother-*

ing and preventing review of these questions. It appears unnecessary to detail them here, except to state generally that Appellant's Brief will seek reversal upon the grounds, among others, that:

(a) The case is a large and important one involving plaintiff-appellant's *charge*, as developed at the trial, *that the defendants since 1950 have continued to conspire to cheat him* out of his interest in the broadcasting time and income therefrom, of *radio station XEG* at Monterrey, Mexico, *totalling several millions of dollars*, and as part of the same scheme, also to cheat the Government out of several hundred thousand dollars of income tax.

(b) The record fairly demonstrates, as appellant believes and contends on appeal, *that he was prevented from having a fair trial in the District Court by a long, cumulative series of erroneous rulings of the court preceding and during the long trial*, covering matters of discovery, evidence, repeated refusals to admit oral and documentary evidence offered by plaintiff, and other matters in the conduct of the trial, which he does not deem necessary to elaborate here,—*amounting in effect to a serious miscarriage of justice in the District Court* (where this equity case was tried to the court without a jury).

(c) Apart from (b), serious legal errors exist in the record preceding and during the trial and in the court's disposal of it (dismissing the case as to the defendant Guarantee Resere Life Insurance Company at the close of plaintiff's case-in-chief and finding for the other defendants after very slight evidence introduced by them),—which errors, not deemed necessary to elaborate here, appellant believes will require reversal of the case, if it is not disposed of on (b).

Appendix—Appellant's Petition for Time to File Brief and Appendix

4. *Almost continuously from about November 20 to December 23, 1597, appellant's* said counsel was *necessarily absent* and engaged in important matters, *required by orders of court*, in the United States District Court for Puerto Rico, in the reorganization proceeding of Ronrico Corporation, except for a short interval when he was obliged to return on account of an argument in the Appellant Court of Indiana. *Since returning, ill health* part of the time, due to the flu and other complications, *plus unavoidable demands made upon his time by other state and federal courts*, have made it a *physical impossibility* for appellant's counsel to prepare, print and file Appellant's Brief and Appendix by January 31. *Moreover*, although he had courtroom assistance during *part* of the trial from a co-counsel, *Leo Julian*, of Miami, Florida, and a young attorney from San Antonio, Texas, *Mayo Galindo*, it has been and will be *impossible for them to prepare the Appellant's Brief and Abstract* because they are not sufficiently familiar with the over-all case and trial. Appellant's counsel, Jay E. Darlington, who has *had principal charge of the case in trial and pre-trial*, is the *only one able to perform this task*, and due to the *complicated nature* of the case and and record, it would be *impossible for a delegated attorney* to do the task adequately.

5. *The pre-trial record is rather long, and the trial record is exceptionally long, consisting of more than 2,000 reporter's transcript pages plus some 200 documentary exhibits totalling several thousand pages. This makes the task a long and complicated one and reasonably requires much more than the usual amount of time.*

Appendix—Appellant's Petition for Time to File Brief and Appendix.

Appellant's counsel has not deemed it necessary or appropriate to enlarge this petition by detailing the above matters which are set forth in summary form, and are *verified by his affidavit hereto*, but if elaboration or documentation of any of these is deemed necessary by the Court, *he will file same*. Likewise, for the reasons aforesaid, it has not been reasonably possible for appellant's said counsel to complete the preparation and filing of this petition at an earlier date.

6. The judgment appealed from is merely that the plaintiff's amended complaint be dismissed with prejudice at the close of his case-in-chief as against defendant Guarantee Reserve Life Insurance Company, and that plaintiff recover nothing against the other defendants, based upon the findings of fact and conclusions of law. Hence, no judgment for money or performance is being *stayed or delayed by the appeal*, and the defendants suffer no hardship from granting time to the appellant, except the incidental one commonly suffered by defendants-appellees of this character,—being disturbed by the hope of getting the appeal thrown out before having to face the merits, plus the usual worry of having to face a new trial in the event of a reversal.

Wherefore, Appellant prays that the time for filing his Appellant's Brief and Appendix be extended *to and including March 17, 1958*. (Our italics).

/s/ Jay E. Darlington
Attorney for Plaintiff-
Appellant

Appendix—Appellant's Petition for Time to File Brief and Appendix.

State of Indiana)
County of Lake) ss.

Jay E. Darlington, being first duly sworn, says the fact allegations in the foregoing petition are true to his best knowledge and belief. (Our italics).

(Affidavit of service follows.)

/s/ Jay E. Darlington

(Jurat of Notary)

Tr. pp. 26-30.

Appendix—Answer of Appellees Jaffe Opposing Extension, and Motion to Dismiss

ANSWER OF BEN JAFFE AND EUGENE JAFFE, APPELLEES, OPPOSING PETITION FOR A THIRD EXTENSION OF TIME TO FILE BRIEF AND MOTION TO DISMISS APPEAL.

(Filed February 5, 1958)

Appellees, Ben Jaffe and Eugene Jaffe, again oppose the request made in the petition of plaintiff-appellant for a third extension of time to file his brief and appendix in this Court and, for the reasons hereinafter stated, move that this appeal be dismissed:

1. Appellees have been harassed by this suit since its institution in April of 1953. In the opinion of appellees' counsel as well as the District Court, the cause is completely devoid of merit. Judgment was entered by the District Court on June 19, 1957 and this appeal was docketed in this Court on October 17, 1957, the last day permitted for such docketing by the rules. Under the rules, appellant's brief and appendix normally would have been required to be filed on November 17, 1957. Pursuant to motion and petition and without objection on the part of appellees, this Court, on November 13, 1957 entered an order extending the time for filing appellant's brief and appendix to and including December 31, 1957. No brief and appendix was filed on or prior to that date. Without obtaining an order from this Court on proper application for an extension prior to the expiration date of December 31, 1957, appellant filed on December 31, 1957 a petition for a second extension to and including February 15, 1958. On consideration of the petition and the answers and objections thereto by all appellees, this Court refused to extend the time to February 15, 1958, but did by order of January

10, 1958 extend the time for filing appellant's brief to and including January 31, 1958. Neither the brief nor appendix was filed within such time. The faculty of counsel for appellant for presuming on this Court and opposing counsel and ignoring and flouting the orders of this Court was again evidenced by his filing of a petition on January 31, 1958 (the last day within which his brief and appendix were due) to extend the time for filing appellant's brief and appendix once more to March 17, 1958. As the record now stands, appellant is again in default, this time of the Court's order of January 10, 1958 extending the time to and including January 31, 1958.

2. No justifiable or adequate reasons or good cause have been shown to excuse this neglect. In all three petitions for extensions of time, the principal reasons given are preoccupation in other litigated matters by Mr. Jay E. Darlington, appellant's attorney, and that Mr. Darlington is solely charged with the duty of preparing the brief and appendix. Nothing new is set forth in this further petition for an extension, except that appellant's counsel now seeks to escape his negligence by making scurrilous, reckless and unfounded charges that the District Court was a party to a serious miscarriage of justice and denied appellant a fair trial, and that there was a scheme "to cheat the Government out of several hundred thousand dollars of income tax." (See Paragraphs (a) and (b) of the Petition, page 2.) This case has nothing to do with income or other taxes. The matter of taxes is wholly irrelevant to this suit and is completely foreign to the issues. The District Court was so fair and patient with appellant that it permitted five weeks to be devoted to a cause of

this nature. Furthermore, there are no matters having to do with public policy or the administration of justice in lower federal courts involved here. The charges leveled at the District Court are unjustified and without merit.

The injection of these unfounded charges are obviously an attempt by appellant's counsel to engender and create a prejudicial atmosphere reflecting on appellees and the District Court for the purpose of attempting to save this appeal and obtaining another extension of time without the necessity of showing a sufficient excuse for appellant's utter failure and neglect to obey not only the order of this Court of January 10, 1958, but also its prior orders.

3. It is also asserted, as it has been in all of the appellant's prior petitions, that the said Mr. Darlington is the only counsel sufficiently familiar with the appeal to prepare the documents and that Mr. Darlington "was necessarily absent and engaged in important matters, required by orders of court, in the United States District Court for Puerto Rico, in the reorganization proceeding of Ronrico Corporation, except for a short interval when he was obliged to return on account of an argument in the Appellate Court of Indiana." Apparently the case at bar, notwithstanding appellant's emotional and unsupported appeals to the contrary, is not of sufficient importance to merit the attention of counsel for appellant. Likewise, it seems that the orders of this Court of Appeals are somewhat less persuasive than the orders of the District Court of Puerto Rico and the Appellate Court of Indiana. These reasons, repeated in three consecutive petitions for extensions of time, do not constitute adequate and sufficient grounds to make out a case of excusable neglect in light

of the existing facts with respect to this appeal and under the cases hereinafter cited:

(a) Mr. Darlington was assisted on the trial of this cause, as the record shows, by two other attorneys, Mr. Leo S. Julian of the Florida bar and Mr. Mayo Galindo of the Texas bar. In addition thereto, Mr. John R. Jeffers of the Illinois bar was also an attorney of record below, as he is in this Court. Regardless, therefore, of Mr. Darlington's preoccupations and travels, he has had available the benefit of the services of three additional counsel, at least two of whom are fully familiar with this litigation and there is no reason why the third counsel, John R. Jeffers, should not be presumed to be familiar with this litigation since he was attorney of record in the trial court, as he is in this court. This suit was initially filed on appellant's behalf by Mr. Leo S. Julian in the state court of Florida from which it was removed to the United States District Court in Florida and then subsequently transferred to the District Court at Chicago, Illinois.

(b) If appellant was serious about prosecuting his appeal he has had more than ample time to do so despite the assertions in his three petitions for extensions. Obviously, Mr. Darlington regards all of his other litigation as being more important than the instant appeal and all of the other courts before whom he alleges he is engaged as less generous in the matter of continuances and extensions of time. If a case is of such importance that an appeal is warranted, the parties as well as the court, are entitled to anticipate a reasonably early disposition thereof, particularly when the litigation has been pending for some five years and the appellant has been represented by sev-

eral attorneys of record. As of January 31, 1958, one hundred six days have elapsed since the docketing of this appeal without the filing of any brief or appendix. It seems to be an inescapable conclusion that appellant is neither serious about a review nor interested in a timely disposition of this case, yet he wants the cause to remain on the dockets of this Court.

(c) In the prior answer of these appellees, authorities were cited which we deem worthy of repetition and ask the Court's indulgence. These authorities deal with a motion to file and docket a record after the time has expired and are equally applicable here. This Court has stated that its rules are expected to be followed. In re Gammill, 129 F. 2d 501, 502 (C.C.A. 7th). In Gammill there was, as there is here, more than one counsel and, as the court pointed out, the record indicated that appellant had been represented by three co-counsel and no reason was shown why, if one were ill, the others could not carry out the necessary steps in the cause. In denying a motion for leave to docket an appeal, this court said:

> "* * * it is clear that the rules are expected to be followed, and that unless reasons satisfactory to the court are advanced as a basis for special relief from their provisions, it will take such action as it deems appropriate. In this case, such action would be denial of leave to docket the appeal, which leave is required by Rule 11(2) of this court * * *."

To the same effect are Tucker Products Corporation, *v.* Helms, et al., 171 F. 2d 126 (C.C.A. 9th) and Maghan *v.* Young, et al., 154 F. 2d 13 (Court of Appeals, District of Columbia). In Tucker the court said:

"We agree that the appeal should be dismissed. The contention of plaintiff and appellant is that its attorneys, officers of this court, may engage in other litigation and that this 'preoccupation in other matters' relieves them of the preparation and presentation of an affidavit and motion for the extension of time provided in our Rule 13[1] to be made prior to the expiration of the time fixed by the district court under Rule 73 • • •."

"We do not regard such preoccupation in other litigation as a reasonable ground for neglect of the duties of officers of this court. (Citing Maghan *v.* Young)" (Underscoring ours).

In Maghan *v.* Young, supra, it was stated:

"The explanation of appellant's neglect is that appellant's counsel was professionally engaged in attending to other matters. We think this is not an adequate reason to justify our exercise of discretion."

In 3 American Jurisprudence, Sec. 781, p. 338, it is stated:

"If an appellant neglects to file a brief within the time fixed by rule of court, without obtaining an extension of time, his appeal may be dismissed or the judgment affirmed, unless there is a sufficient excuse shown."

Certainly no sufficient excuse is shown in the petition filed herein for the failure to obey the order of this Court of January 10, 1958.

4. Appellant's contention that no hardship is imposed on the appellees, while immaterial, also lacks merit. Appellees and their counsel have been of the opinion that appellant's suit was vexatious and without foundation since it was filed in April, 1953. Appellees have been harassed by this litigation for nearly five years and are entitled to a timely disposition of the same. The opinion of appellees

and their counsel that this suit was devoid of merit is supported by the findings of fact and conclusions of law entered by the trial court and we respectfully refer this Court to these findings and conclusions which are a part of the record in this Court.

Wherefore, appellees pray that appellant's petition for an additional extension of time be denied and that this appeal be dismissed at appellant's costs.

/s/ Claude A. Roth
/s/ Charles D. Stein
Attorneys for Appellees
Ben Jaffe and Eugene Jaffe

Gottlieb and Schwartz
231 South LaSalle Street
Chicago 4, Illinois
Of Counsel

(Affidavit of service appended)
Tr. pp. 39-47.

Note: Similar answers by appellees *Guarantee Reserve Life Insurance Company and Schwartz*, are here omitted, as being substantially covered by foregoing answer of appellees *Jaffe*.
Tr. pp. 31-38.

APPELLANT'S RESPONSE TO MOTIONS TO DISMISS.

(Filed Feb. 12, 1958)

Appellant has received from the Clerk, a routine printed notice of the filing of a Motion to Dismiss the Appeal under Rule 22 of this Court, returnable February 12, 1958. However, the only motion or petition of such character served upon Appellant consists of an alternative prayer in the Answer of Ben and Eugene Jaffee to Appellant's pending Petition for Extension of Time to file his brief and appendix. In response thereto, Appellant says:

1. Said motion on its face is frivolous, being a mere appendage to the Answer of said Defendants-Appellees to the Petition for Extension of Time. It is not joined in by the other Appellees, who merely answer the Petition and ask that it be denied.

2. Appellant's pending Petition for Extension of Time *contains adequate sworn factual allegations* sufficient to rebut said Motion to Dismiss, *and same is incorporated in this Response by reference.*

3. As appears from the pending Petition for Extension of Time, *good and sufficient reason exists for the previous and present delay* of Appellant in filing Appellant's Brief and Appendix, due to the *size* of the record, the *nature* of the case, and *the practical exigencies confronting appellant's counsel.* This is met in the Appellees' Answer and Motion to Dismiss by the same kind of quibbling, criticism of appellant's counsel, distortion, and evasion which characterized the pre-trial and trial proceedings below, both on the part of the same appellee's counsel and the trial judge, from which this appeal was taken.

4. Appellant respectfully urges, that this Court, at this preliminary stage, should not be misled into the same errors, which characterized the pre-trial and trial proceedings below to an extent which not not only calls for exercise of this Court's function of review, but also the function of other appropriate departments and agencies of the Government.

Wherefore, Appellant prays that said frivolous Motion of Appellees Ben and Eugene Jaffe to Dismiss the Appeal be denied, that full and adequate time and opportunity be afforded the Appellant and his counsel to expose and review the gross errors and miscarriages of justice invited by the Appellees and committed by the Court below in this case, and for all just and proper relief in the premises. (Our italics.)

/s/ Jay E. Darlington
Attorney for Appellant.

State of Indiana)
County of Lake) ss:

Jay E. Darlington, being first duly sworn, says he makes this affidavit on behalf of Appellant as he is authorized to do, *that the facts and allegations in the above Response are true in substance and fact* to his best knowledge and belief. (Our italics.)

(Affidavit of service follows).

/s/ Jay E. Darlington

(Jurat of Notary)

Tr. pp. 48-49.

Note: Responses (answers) filed by the appellees on February 14, 1958 to the above Appellant's Response to Motions to Dismiss are here omitted, as being substantially covered by their answers opposing extension, and their motions to dismiss, above set forth.

Tr. pp. 50-56.

Appendix—Order Denying Petition for Time, and Denying Motions to Dismiss

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, February 14, 1958

Before
Hon. Philip J. Finnegan, Circuit Judge

WILLIAM C. BURNS, etc., Plaintiff-Appellant, vs. BEN JAFFEE, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12158

On consideration of appellant's petition for additional time to file brief and appendix; the answers of appellees thereto and alternative motions of certain appellees to dismiss appeal; and appellant's response to motions to dismiss appeal,

It Is Ordered that appellant's petition for additional time for filing his brief and appendix be, and the same is hereby, Denied.

It Is Further Ordered that the motions of certain appellees to dismiss this appeal be, and the same are hereby, Denied, without prejudice.

Tr. p. 57.

MOTION BY ALL APPELLEES TO DISMISS APPEAL

(Filed Feb. 28, 1958)

Now come all of the appellees by their respective counsel and move that this appeal be dismissed:

1. On January 31, 1958 (the last day within which appellant's brief and appendix were due), appellant filed his petition requesting a third extension of time within which to file his brief and appendix. On February 14, 1958, this Court denied appellant's petition for additional time for filing his brief and appendix and further denied the motions of the appellees to dismiss this appeal; the denial to dismiss was expressly made without prejudice.

2. As of this date (February 23, 1958) two weeks have elapsed since the entry if the aforesaid order denying appellant's petition for additional time to file his brief and appendix and one month has elapsed since said brief and appendix were due by virtue of the last of the orders of this Court granting extensions. This Court's order of February 14, 1958 remains in full force and effect. In view of that order denying appellant any further time to file his brief and appendix, he now has no standing in this Court to file such brief and appendix. It is respectfully submitted that it is now four and one-half months since this appeal was docketed in this Court. Furthermore, appellees have been harassed by this litigation for nearly five years. We, therefore, renew our motion to dismiss this appeal.

3. We respectfully submit that by denying appellant further time, this Court clearly recognized by its order of February 14, 1958 that appellant had not made any showing of justification or good cause to excuse his long and continued neglect and indifference to the prior orders of this Court granting extensions. In that connection, we demonstrated by detailed recitations, accompanied by

authorities, the inexplicable and unjustified delays and neglect on the part of appellant in the answer and motion of Ben Jaffe and Eugene Jaffe, appellees, filed in this Court on February 5, 1958, reference to which is hereby made. May we also respectfully point out that appellant has had all the consideration and indulgence which any one could fairly ask of this Honorable Court or any other court.

Wherefore, appellees respectfully again move that this appeal be dismissed at appellant's costs.

Dated: February 28, 1958.

/s/ Claude A. Roth & Charles D. Stein
Attorneys for Appellees Ben Jaffe and Eugene Jaffe

/s/ Hubert L. Will & Wayland Cedarquist
Attorneys for Guarantee Reserve Life Insurance Company of Hammond

/s/ Harold T. Bere
Attorney for Harold S. Schwartz and Harold S. Schwartz and Associates, Inc.

(Affidavit of service appended.)

Tr. pp. 58-61.

Note: On March 5, 1958, appellant moved for and was granted time to March 17, 1958 to answer the above Motion to Dismiss. (Order by Judge Parkinson).

Tr. pp. 62-65.

Appendix—Appellant's Answer to Motion to Dismiss Appeal

APPELLANT'S ANSWER TO MOTION TO DISMISS THE APPEAL

and Motion for Oral Argument Thereon.

(Filed March 17, 1958)

Comes now the appellant and for answer to the "Motion by All Appellees to Dismiss Appeal", filed on or about February 28, 1958, says:

1. From a fact standpoint, the motion on its face is merely a repetition of the unfounded criticism of appellant's counsel, Jay E. Darlington, contained in their earlier opposition to extension of time for his brief. Moreover, its few factual statements are incomplete and misleading. The defendants-appellees now complain that they "have been harrassed by this litigation for nearly five years" (middle of page 2). They omit to state the fact that *the major part of the five years* since the case was started *has been taken up by their own dilatory tactics:* (1) Removing the venue of the case from the Southern District of Florida to the Northern District of Illinois, which took from April 9, 1953 to December 11, 1953, (2) their amended motions to dismiss, which took from May 24, 1954 to September 14, 1954, (3) *their delay of seventeen months in filing their answers*, from September 14, 1954 to February 20, 1956, *an accommodation which they sought and obtained from the plaintiff-appellant by successive stipulations*, (4) their motions for summary judgment which took from April 20, 1956 to December 29, 1956. *It was only five day later*, January 3, 1957, *when the defendants and the District Court suddenly*

commenced to insist on an immediate trial because of the "age" of the case. This appears in the entire record filed in this Court and is summarized in appellant's "Statement under Rule 12-C," a copy of which is appended hereto as *Exhibit A* of this answer for the court's convenience.

Relative to the statement at the top of page 2 of the motion that as of February 28, 1958 "two weeks have elapsed" since the order of February 14 by Judge Finnegan denying additional time to file Appellant's Brief, *appellant's said counsel was necessarily absent in Puerto Rico from February 16 to March 1, 1958* in connection with the *trial* of Civil No. 4639, and also a corporate reorganization proceeding, Bankruptcy No. 1246 in the United States District Court for the District of Puerto Rico,—said civil trial having been set by an *order* made about *ten months earlier.*

2. What is a reasonable time for filing an Appellant's Brief in one case is totally inadequate in another, depending upon the *size* of the record, the *nature* of the questions to be presented, and also other exigencies confronting appellant's counsel, such as *unavoidable commitment in other courts,* intervening *periods of ill health,* and the like. As shown in "Appellant's Petition for Additional Time to File Appellant's Brief and Appendix" filed January 31, 1958, appellant's said counsel, Jay E. Darlington, *is the only attorney on appellant's side who is in a position to prepare an adequate Appellant's Brief,* due to the fact that he conducted the entire trial, he is the only one of appellant's attorneys who was *present* during the entire trial, and is the only one sufficiently familiar with the intricate questions of fact and law involved. Also, as shown in said petition, said attorney was *necessarily absent in Puerto Rico* in connection with the

above reorganization proceeding in the United States District Court there, during nearly all of the period from November 20 to December 23, 1957; and thereafter the intervening holidays, together with *an interval of ill health the middle part of January*, and *other unavoidable commitments* made it impossible to start work on Appellant's Brief and Appendix until March 1, 1958. A true copy of said petition for additional time to file the brief, filed January 31, 1958 and denied February 14, 1958 as aforesaid, is appended hereto as *Exhibit B* for the court's convenience.

3. Since March 1, 1958, appellant's said counsel, Jay E. Darlington, *has devoted all possible time to the preparation of Appellant's Brief*, which he proposes to complete and tender with a petition for leave to file at the earliest possible date. Sufficient manuscript material is *now ready to go to the printer* to make an estimated 200 printed pages of brief and appendix. *He estimates that the Appellant's Brief and Appendix can be tendered for filing about March 31, 1958.*

4. As an indication of the good faith efforts that have been and are being made by appellant's said counsel to complete this brief and appendix, this current work thereon is being done at considerable sacrifice and some jeopardy to his health, consisting of the fact that it is being done contrary to his doctor's orders and deferring two days of medical check-up until the brief is completed.

5. *The record is very large and complicated*, and, as shown in Exhibit B hereof, the *questions* to be presented are of such character as to require this Court's consideration of much of the clerk's original file, *practically all of the oral testimony*, and *many of the exhibits*, both admitted and rejected. The record includes:

(a) Clerk's original file of 740 pages.

(b) Reporter's transcript of testimony and court proceedings, 2357 pages.

(c) 192 exhibits, comprising several thousand pages of material.

6. As a matter of *law*, it is undisputed that notice of appeal was timely filed below, and the record was timely filed and docketed in this court. The order of February 14, denying additional time to file Appellant's Brief *does not preclude this Court from exercising its discretion to receive the brief when tendered.* Moreover, total lack of an Appellant's Brief *would not be jurisdictional* and would *not preclude this Court from hearing oral argument* and determining the appeal on its *merits*. The present motion to dismiss does not contend that jurisdiction is lacking or the proposed tendered brief cannot be received. This is particularly true in view of *the important questions of fraud involved in this large case*, and *appellant's contention that he was denied and deprived of a fair trial below by a series of gross abuses of discretion* and other errors. Questions of this kind *should not be refused* consideration on the merits, particularly at the behest of the allegedly fraudulent and conspiring defendants, *when the result would be to smother alleged gross errors and abuses of discretion in their favor below*. See Exhibit B, page 2.

7. The second paragraph of *Rule 73(a) of Civil Procedure* plainly provides that: "Failure of the appellant to take any of the further steps (after filing notice of appeal) to secure the review of the judgment appealed from *does not affect the validity of the appeal.*" The remainder of that paragraph seems to indicate that dismissal is not proper after the appeal has been docketed. This Court's

Rule 10 expressly adopts the above paragraph of Rule 73(a), and the latter would control anyhow.

8. Further, *this Court's Rule 15(b) and (d)* seem to indicate two things:

Paragraph (b) indicates that even as to the more serious failure of an appellant to *file and docket his* appeal within the time allowed, the court has *discretion to permit the filing* where "the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal."

Paragraph (d) provides that if an appellee *dockets* and files the appeal (after appellant's failure so to do), in that event "it shall stand for disposition," which apparently means disposition on the merits, because the paragraph goes on to provide that the appellee "may have the action dismissed" by this Court without docketing, by filing a certificate from the clerk below that the appeal was taken from that court.

Similarly, with respect to a defective notice of appeal (a more serious matter than involved here), the notice was held sufficient and the court said:

"the rules should be liberally construed and review should not be denied on mere technicalities where this can be avoided."

Fishbaugh v. Armour & Co. et al., (4 Cir. 1950) 185 F. 2d 541, 542.

Wherefore, plaintiff-appellant prays:

1. That the motions to dismiss be denied, and

2. *For oral argument on said motion, in view of the importance of the matter involved.* (Our italics).

/s/ Jay E. Darlington
Attorney for Appellant

Tr. pp. 66-70.

Appendix—Exhibit A of Appellant's Answer to Motion to Dismiss

EXHIBIT A

(of above answer)

Statement Under Rule 12-C (of Court of Appeals)

The plaintiff-appellant commenced this civil action on March 21, 1953 in the Circuit Court of Dade County, in Miami, Florida against defendants-appellees Ben Jaffe and Guarantee Reserve Life Insurance Company of Hammond, Indiana.

Said individual defendants, on April 2, 1953, caused the action to be removed to the United States District Court for the Southern District of Florida, Miami Division, on ground of diversity of citizenship between plaintiff, a citizen of Texas, and the defendants, both citizens of states other than Texas.

Thereafter, on April 9, 1953, the defendants filed their motions and affidavits for transfer of the action to the United States District Court for the Northern District of Illinois in Chicago, on the ground that the latter was a more convenient forum. Though opposed by the plaintiff, the court granted said motions by its order of May 15, 1953. The order was stayed while the plaintiff appealed therefrom, resulting in affirmance, with one Judge dissenting.

The cause was docketed in the United States District Court for the Northern District of Illinois, Eastern Division, on December 11, 1953 and was assigned to Honorable Julius J. Hoffman, where it has remained. All proceedings have been had before the Judge.

Amended complaint was filed by plaintiff, by leave, on May 3, 1954, bringing in three additional defendants, who

were summoned and appeared by counsel to-wit: Harold S. Schwartz & Associates, Inc., Harold S. Schwartz, and Eugene Jaffe. These, plus the two original defendants, comprise the five defendants-appellees.

The First Claim of the amended complaint is an equitable action wherein plaintiff seeks to establish and enforce his rights under an alleged joint adventure relationship between himself and defendant Ben Jaffe. He alleges Jaffe violated his fiduciary duties to plaintiff, which the relationship imposed on Jaffe, by secretly acquiring the subject matter of the joint adventure and misappropriating plaintiff's share thereof, and the income therefrom, to himself; and that Jaffe was joined by the other defendants in a conspiracy to carry out the misappropriation,—all as more fully elaborated in the amended complaint. The Second Claim is based upon the same facts but seeks legal relief by money damages.

Amended motions to dismiss the amended complaint were filed by defendants Jaffe and Jaffe and Guarantee Reserve Life on May 24, 1954, and by defendant Schwartz and Harold S. Schwartz and Associates Inc. on June 8, 1954. The three motions were similar, contending that the amended complaint is an action upon a contract, which is insufficient for lack of substance, invalid for lack of mutuality, for illegality, and other grounds more fully set forth in the motions and supporting briefs.

Order denying the amended motions to dismiss was entered without opinion, September 14, 1954.

Answers by the several defendants to the amended complaint were filed, after successive extensions of time by stipulation, on February 20, 1956. They consisted of denials of the material allegations of the amended com-

plaint, and re-assertion of defenses made in the motions to dismiss, plus an affirmative answer of release, based upon an exhibited writing,—which need not be elaborated here.

Motions for summary judgment were filed by defendants on April 20, 1956. After a succession of responses and briefs, the last filed by defendants on November 21, 1956, the court, by order and memorandum opinion on December 29, 1956, denied motions for summary judgment.

An order entered January 3, 1957 set the trial to begin February 4, 1957, and the trial did begin before the Judge (plaintiff having waived a jury on the Second Claim) on February 5, 1957. (During the period January 3 to February 5, plaintiff by a series of motions, each overruled, sought to obtain additional time and discovery in preparation for trial, but this need not be detailed here). Trial proceeded until February 14, when it was recessed at the court's suggestion and by consent of all parties. It was resumed May 2, 1957 and continued until May 16, 1957, when the court orally announced its decision to the effect that the motion of the defendant Guarantee Reserve Life Insurance Company of Hammond to dismiss the action for insufficient proof at the close of plaintiff's case-in-chief would be sustained, and that there would be findings, conclusions and decree in favor of the other defendants that plaintiff take nothing by his action,—drafts to be submitted by defendants by June 19. They were submitted and signed by the Judge on the latter date to the above effect. (Defendant Guarantee Reserve Life, standing on its motion to dismiss, did not introduce evidence, but the other defendants introduced short evidence during

approximately the last half day. Aside from that, the trial was devoted to plaintiff's case-in-chief).

Notice of appeal, and appeal bond, were filed by plaintiff-appellant on July 19, 1957. An order of the District Court extended the time for filing the record and docketing the appeal until the 90th day, October 17, 1957.

Tr. pp. 72-75.

Exhibit B of above Answer to Motion to Dismiss is copy of Petition for Time filed Jan. 31, 1958, supra.

Tr. pp. 72-79. See pp. .... hereof, *supra*.

(Affidavit of Service Appended)

Appendix—First Order (3-19-58) Dismissing Appeal

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, March 19, 1958

Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

William G. Burns, etc.,
Plaintiff-Appellant,
No. 12158 vs.
Ben Jaffee, et al.,
Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of appellees' motion to dismiss appeal heretofore filed on February 28, 1958 and the answer thereto of the appellant, and it appearing to the Court that this appeal was docketed herein on October 17, 1957 with the time for filing appellant's brief and appendix thereby expiring on November 16, 1957, and

It further appearing that on November 8, 1957 the appellant filed a petition for extension of time within which to file his brief and appendix to and including December 31, 1957 which petition was granted by order entered on November 13, 1957, and

It further appearing that on December 31, 1957 the appellant filed a petition for an additional extension of time within which to file his brief and appendix which petition was granted, over the objection of the appellees, and the time extended to and including January 31, 1958 by order entered on January 10, 1958, and

Appendix—First Order (3-19-58) Dismissing Appeal

It further appearing that the appellant failed to file his brief and appendix within the time as two times extended by this Court and has not done so to this date in violation of the Rules of this Court, and

It further appearing, from the answer of the appellant heretofore filed on March 17, 1958, that work on appellant's brief was not even commenced until March 1, 1958,

It Is Ordered And Adjudged By This Court that the motion of the appellees to dismiss appeal be granted, and this appeal is hereby dismissed at costs of the appellant.

Tr. pp. 81-82

APPELLANT'S PETITION FOR REHEARING

(embodying Motion for Consideration by the Court in banc, and Motion for Oral Argument on the Petition)

(Filed April 3, 1958)

The plaintiff-appellant respectfully petitions for a rehearing and reconsideration of this Court's order and judgment of March 19, 1958 dismissing this appeal (and also moves for the incidental relief of having this petition considered by the court *in banc*, and for oral argument on this petition under this Court's *Rule* 25(a)), for each of the following reasons:

(1)

Plaintiff-appellant respectfully urges that the nature and importance of this appeal, and the unusual nature of the order dismissing it for the alleged fault of appellant's counsel in not sooner filing appellant's brief, deserved, and still deserve, the consideration of at least a full division of this Court, and preferably the court *in banc*, whereas final judgment of dismissal was entered by only two members of the court.

Whether this technically constituted a sufficient quorum of a division of the Court depends upon unpublished orders and assignments of the judges. (28 *U.S.C.A.* 46 and *this Court's Rule* 4).

But in any event, the nature and importance of the case and the unusual character of its final disposal reasonably should have had the attention of at least a full division and preferably the attention of the full court.

No reason is apparent why this should not have been done and why it cannot yet be done.

(2)

Under the circumstances shown by the record of the case in this Court, said dismissal unreasonably and unjustly deprives the plaintiff-appellant of a review in this Court. (See in particular Appellant's Answer to the Motion to Dismiss, and Exhibits thereof).

(3)

Under the circumstances shown by the record of the case in this Court, said dismissal is a *miscarriage of justice* (which) not only operates against the plaintiff-appellant's interest, but is also detrimental to the *public interest* and detrimental to the *proper administration of justice in this Court*, because it operates to prevent review of serious charges of *fraud and conspiracy* made by the plaintiff-appellant against the defendants-appellees, and also prevents review of his serious charges of *maladministration of justice in the District Court*. (See in particular Appellant's Answer to the Motion to Dismiss, and Exhibits thereof).

Circumstances appearing in the records and files of this Court's clerk, and also in the handling of cases of similar type in certain other (not all) federal courts, including the District Court in this case, seem to indicate that such summary, unjust and improvident disposals of cases result from a false standard of the proper functions of the courts. *Speedy disposal* of cases appears to have become the principal goal, instead of giving an adequate opportunity to the complaining parties' counsel to

fully present the cases and full opportunity for adequate deliberation by the courts in the interest of a *just disposal.*

The same circumstances appear to indicate that this false and dangerous doctrine has gradually grown up as a result of pressure exerted by the *Administrative Office of the United States Courts.* This is a highly improper extension of its true statutory functions as created by Congress, and contrary to the announced purpose of Congress and of this Court to find "means of improving the administration of *justice,*" not means of speeding final disposal of cases by rushing the plaintiffs and appellants and their counsel. (28 *U.S.C.A.* 333 *and this Court's Rule* 30(a).)

This false cult of *speed*, regardless of its origin or purpose, operates not only to deteriorate the quality of the presentation and decision of cases by the complaining party and by the trial courts and reviewing courts,—but what is more serious and sinister, *it operates actively in aid of defendants charged with serious civil frauds and conspiracies* as in this case, and similarly *operates in favor of defendants charged with subversive activities* and other wrongs, when ever the case is large and complicated.

This situation, in our opinion, is sufficiently serious to warrant and require this Court's careful consideration of it as it applies to the present case, and to warrant the careful consideration of this Court and Congress as it applies to cases in general.

(4)

Under the circumstances shown in this Court's record of this appeal, plaintiff-appellant's delay in filing his brief was not unreasonable, and was not adequate grounds for dismissing the appeal because:

(a) The delay was unavoidable and was for good and sufficient causes, as shown by Appellant's Answer to the Motion to Dismiss.

(b) The records of this Court show a number of appeals in the last several years, both before and since this Court's new rules went into effect, in which other appellants were granted lengths of time to file their briefs equalling or exceeding the time sought by this appellant. The reasons they showed for this delay were no greater than those shown by this appellant. Their appeals were not dismissed. (See discussion and tabulation of such cases in the brief to be filed supporting this petition).

(c) As a matter of law, there are few, if any, comparable cases in modern times in which a Court of Appeals has dismissed a large and important appeal of this character under the circumstances shown in this record. (See authorities and discussion in the brief to be filed supporting this petition).

(5)

The order of dismissal is inaccurate in fact and unfair to the appellant and his counsel because it states a half-truth. It selects one statement of Appellant's Answer to the Motion to Dismiss to the effect that appellant's counsel had not been able to start work upon the brief until March 1, but it omits to state the facts set forth in

that Answer and preceding parts of the record showing that this delay was for good and sufficient cause.

Moreover, a fair reading of the quoted statement in its context with the rest of the Answer and preceding parts of the record, indicates that the "work" referred to was the actual writing of the manuscript for the printer, whereas it is fairly to be inferred from preceding parts of the record that important parts of the over-all work in preparing an appellant's brief, such as analyzing the voluminous exhibits and the like, had previously been done. But this matter of defining "work" is unimportant since it plainly appears from the Answer and the entire record in this Court, and also from the size and character of the record brought up from the District Court, *that plaintiff-appellant's counsel had exercised all reasonable effort, and in fact had gone beyond reasonable effort, to get the appellant's brief prepared and filed.*

It also appears from said Answer and from this petition and the supporting brief to be filed, that since March 1, the delay in completing appellant's brief has been caused in part by the necessity of appellant's counsel to fight for time in which to file it and the right to file it,—which creates a vicious circle of delay and injustice.

(6)

Another time element which perhaps has not yet arisen for this Court's consideration, but which does arise here is this:

The extra labor of preparing the Appendix of an Appellant's Brief under Rule 16 *(effective July* 1, 1956) *requires much more time on the part of appellant's counsel*

than formerly. That is particularly true in cases such as the present one involving more than 700 pages of the District Court's original file of pleadings, orders, etc., more than 2,000 pages of testimony and trial proceedings, and nearly 200 voluminous exhibits, as listed in our Answer.

Under the former practice, the work of narrating this evidence and condensing the exhibits would have occurred before an appeal was docketed. Thereafter the clerk, or appellant's counsel, would have had the essential parts of the record printed (substantially the same parts which now go in the Appendix).

It appears from the records of this Court over the past several years that *the mere printing of the record*, particularly in large cases of this type, frequently consumed as much or more time between the date of docketing the appeal nd date of filing the printed record, than the entire time sought by this appellant in preparing and filing his Appellant's Brief and Appendix.

It plainly appears from the aforesaid Answer that the work of preparing and printing the Appendix alone is enormous in this case.

Accordingly, in this case and others like it, this Court should consider the fact that the thirty days allowed by *Rule* 16(a) for the over-all task of preparing and printing the Appendix and Appellant's Brief, while probably adequate in small appeals with small records, *is entirely inadequate and requires liberal extensions in cases of this type.*

Under the former practice, the thirty days for Appellant's Brief would not *begin* to run until the printed rec-

ord was filed. An appellant now is under the same necessity of getting his Appendix printed (at least in the form of numbered proof pages) before he can properly write his Appellant's Brief because Rule 17(a)(1) in its final paragraph requires the brief to contain "a concise statement of the facts * * * with the *pages* of the *printed Appendix* or record where the recited facts appear."

A motion is being filed herewith for an extension of time in which to file a supporting brief, due to circumstances making it impossible to complete and file same at the same time as this petition.

WHEREFORE, Plaintiff-Appellant prays:

1. That this Court may rehear and reconsider this cause, and vacate the order and judgment dismissing it.

2. That this petition may receive the consideration of this Court *in banc*, whether heard orally or not.

3. That this Court may exercise its discretion to hear oral argument on this petition under Rule 25(a) in view of the importance of the case and the unusual and important question of administration of justice in this Court sought to be presented by the petition.

4. And for all further just and proper relief in the premises.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Plaintiff-Appellant.

(Italics same as original petition.)

This false c Tr. pp. 83-90.

Appendix—Appellant's First Petition for Rehearing

Note: Appellant, on the same date, April 3, 1958 filed his motion for extension of time to April 14 to file a Brief supporting the above Petition for Rehearing. (Tr. pp. 91-92)

Appellees, on April 8, 1958 filed an answer opposing the extension. (Tr. pp. 93-95)

Appellant, on April 16, 1958, filed his petition for further time to April 21, to file the supporting Brief. (Tr. pp. 101-102)

Appendix—Appellees' Answer to Appellant's First Petition for Rehearing

ANSWER TO APPELLANT'S PETITION FOR REHEARING.

(Filed April 11, 1958)

Now come Ben Jaffe, Guarantee Reserve Life Insurance Company of Hammond, Harold S. Schwartz and Associates, Inc., Harold S. Schwartz and Eugene Jaffe, defendants-appellees, by their several attorneys of record, and state:

1. The purpose of filing a petition for rehearing is to state briefly the points supposed to have been overlooked or misapprehended by the Court in entering judgment, with authorities and suggestions concisely stated in support of such points. Appellant's petition for rehearing for the most part is devoted to taking issue with the practice and rules of this Court and criticising the Administrative Office of the Federal Courts. These matters are neither germane nor relevant to the question of whether this Court has overlooked or misapprehended any points of fact or law in entering its order dismissing this appeal. The petition otherwise fails to set forth any points, factual or legal, which the Court is supposed to have overlooked or misapprehended.

2. It is appellant who has overlooked the fact that the Federal rules, as well as the intent and spirit of the rules of this Court, clearly contemplate that the failure to exercise diligence in the prosecution of an appeal warrants a dismissal thereof and that the matter is one resting solely within the sound discretion of the appellate court. We have demonstrated in our prior papers filed herein that the decisions of this and other courts of appeal hold

that the rules are made to be obeyed and that an appeal will be dismissed where good faith and excusable neglect are not shown to exist. In the light of the facts and circumstances in this case, there was no abuse of discretion in dismissing this appeal. We also showed in our prior papers that the delay was not unavoidable or excusable, as asserted in the petition for rehearing, and that appellant's counsel repeatedly ignored the orders of extension granted by this Court.

3. By way of review, may we take the liberty of pointing out that this appeal was docketed in this Court on October 17, 1957 and the time for filing appellant's brief and appendix initially expired on November 16, 1957. During this period appellant petitioned and obtained an extension of time for filing his brief and appendix to and including January 31, 1958. On January 31, 1958, the very day the last extension expired, appellant filed a further petition requesting a third extension of time to March 17, 1958, which petition was denied on February 14, 1958. In appellant's answer (filed on March 17, 1958) to a motion by appellees to dismiss this appeal, appellant conceded that he had not even commenced work on his brief and appendix until March 1, 1958. To this date no brief or appendix has been tendered to this Court, although it will be six months on April 16, 1958 since this appeal was docketed. It is submitted that this Court has been more than generous in granting liberal extensions to appellant.

4. The statement in the petition for rehearing that the records of this Court show a number of appeals in the last several years in which other appellants were granted lengths of time to file their briefs equalling or exceeding the time sought by appellant is obviously of no relevancy or materiality. The discretion vested in the

reviewing court is exercised on the basis of the facts and circumstances of each particular case. Furthermore in making this assertion appellant also overlooks the fact that in this case orders of this Court granting extensions were repeatedly ignored.

CONCLUSION.

In his petition for rehearing, appellant fails to state any point of fact or law whatsoever, which this Court is supposed to have overlooked or misapprehended. Appellant merely adverts to his prior motions and petitions which have already had the careful attention and consideration of this Honorable Court. Consequently, the petition for rehearing should be denied.

Wherefore, appellees respectfully move that appellant's petition for rehearing be denied.

Ben Jaffe and Eugene Jaffe,
Appellees,
By Claude A. Roth,
Charles D. Stein,
Their Attorneys.

Harold S. Schwartz and
Harold S. Schwartz and
Associates, Inc.,
Appellees,
By Harold T. Bere,
Their Attorney.

Guarantee Reserve Life Insurance
Company of Hammond,
Appellee,
By Hubert L. Will,
Wayland B. Cedarquist,
Its Attorneys.

Tr. pp. 96-100.

Appendix—Order (4-16-58) Denying Rehearing en Banc

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, April 16, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

WILLIAM G. BURNS, etc.,
Plaintiff-Appellant,

No. 12158 vs.

BEN JAFFEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The petition of appellant for a rehearing en banc of the order dismissing the appeal herein, entered by this Court on March 19, 1958, be, and the same is hereby, Denied.

Tr. pp. 103.

Appendix—Order (4-16-58) Vacating Prior Dismissal Order, and Again Dismissing Appeal

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, April 16, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge

WILLIAM G. BURNS, etc.,
Plaintiff-Appellant,
vs.
BEN JAFFEE, et al.,
Defendants-Appellees.

No. 12158

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Whereas, the appeal in the above entitled cause was docketed in this Court on October 17, 1957, and under the applicable Rules the time for filing the brief and appendix of appellant would have expired on November 16, 1957; and

Whereas, on motion of appellant, the time for filing his brief and appendix was extended by order of this Court to and including December 31, 1957, an extension of forty-five days; and

Whereas, on December 31, 1957, appellant filed a motion for an additional extension of time with which to file his brief and appendix, which motion was granted over the objection of appellees, and thereby this Court extended the time for appellant to file his brief and appendix to and including January 31, 1958, being a further extension of thirty-one days; and

Appendix—Order (4-16-58) Vacating Prior Dismissal Order, and Again Dismissing Appeal

Whereas, on January 31, 1958, appellant filed a motion to extend the time for the filing of his brief and appendix to March 17, 1958; and

Whereas, on February 14, 1958, an order was entered denying the petition of appellant to further extend the time to file his brief and appendix, and also denying several motions to dismiss the appeal which had theretofore been filed; and

Whereas, on February 28, 1958, all appellees filed motions to dismiss the appeal herein, and on March 5, 1958, appellant moved for an extension of time to answer the motion to dismiss the appeal, which motion was granted; and

Whereas, on March 19, 1958, this Court, acting through Judges Finnegan and Parkinson, ordered that the respective motions to dismiss the appeal herein be granted, and said appeal was dismissed at appellant's costs; and

Whereas, on April 3, 1958, appellant filed a petition for rehearing which embodied a motion for consideration by the Court sitting en banc, and on said date appellant also filed a motion for an extension of time to and including April 14, 1958 to file a brief supporting said petition for rehearing, and on April 16, 1958, appellant filed a petition for additional time to and including April 21, 1958 within which to file brief supporting his petition for rehearing; and

Whereas, all members of this Court in active service have voted to deny the petition for a rehearing en banc; and

Whereas, a division of this Court consisting of Judges Duffy, Schnackenberg and Hastings, has been duly designated to consider all questions raised by said petition for rehearing, and being fully advised,

Appendix—Order (4-16-58) Vacating Prior Dismissal Order, and Again Dismissing Appeal

It Is Ordered, that the motion for a further extension of time to file a brief supporting the petition for rehearing be and the same is hereby denied; and

It Is Further Ordered, that the order of this Court dated March 19, 1958 dismissing the appeal herein be and the same is vacated and set aside.

It being essential for the orderly and prompt disposal of matters pending before this Court that counsel and litigants adhere to the rules limiting the time for filing briefs, appendices, motions and other papers in pending cases, and it appearing further that the attorney for appellant herein had an adequate period of time within which to comply with said rules, and had insufficient reasons for not doing so,

It Is Ordered, that the motions to dismiss the appeal herein be granted, and that this appeal be and is hereby dismissed with costs to the appellant.

(Our bold face emphasis in above order.)

Tr. pp. 104-105.

Appendix—Order Filing Petition for Rehearing of Dismissal Order of 4-16-58

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

May 2, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge

WILLIAM G. BURNS, d/b/a
International Advertising Agency,
No. 12158 vs.
BEN JAFFEE, et al

It appearing to the court that although the time for filing expired on May 1, 1958, counsel for plaintiff-appellant left 30 printed copies of a petition for rehearing, unaccompanied by any affidavits or other documents, with the night guard at 12:06 A.M. on May 2, 1958, which he delivered to the clerk of this court at 9:00 A.M. when his office opened for business,

It Is Ordered that the clerk file the petition and make distribution to the members of the court.

Tr. p. 106.

APPELLANT'S PETITION FOR REHEARING

(embodying Motion for Consideration by the Court in banc, and Motion for Oral Argument on the Petition)

(Filed May 2, 1958)

The plaintiff-appellant respectfully petitions for a rehearing and reconsideration of this Court's order and judgment of April 16, 1958 dismissing this appeal (and also moves for the incidental relief of having this petition considered by the court *in banc*, and for oral argument on this petition under this Court's *Rule* 25(a)), for each of the following reasons:

(1)

The order and judgment of April 16, 1958, on its face and on the face of the record in this Court, is a miscarriage of justice which this Court should vacate and correct in fairness to itself as well as in order to do justice to the Appellant.

After denying the Petition for Rehearing, the Order, for unexplained reasons, vacates the order of dismissal entered on March 19, 1958 (which is a confession of error by the Court), and then forthwith dismisses the appeal again, without granting, and in fact without noticing **the pending motion for oral argument.**

No reason is apparent why this Court should be unwilling to face the Appellant's Counsel in open Court in oral argument before dismissing this large and important appeal.

Appendix—Appellant's Petition for Rehea ng of Dismissal Order of 4-16-58

(2)

The order of April 16, 1958, in an apparent attempt to justify the dismissal, contains a long series of recitals of the alleged delays of the Appellant. But this recital is grossly inaccurate and misleading in fact, because it **omits** all the facts set forth by the Appellant in his Petitions for time, and in his Answer to the Motion for Dismissal, showing good cause for the delays recited in the Order.

(3)

Appellant's counsel, Jay E. Darlington, in previous Petitions for Extension of Time, and in his Answer to the Motion for Dismissal, has referred only in general terms to his ill health which made more speedy action by him impossible. The reason for not emphasizing this point was because he did not want to seek on **personal** grounds what he was already entitled to on grounds of fairness and justice.

However there is being filed herewith the affidavits of the physicians for Appellant's Counsel, showing the **physical impossibility** of complying with the previous requirements of this Court.

Appellant respectfully urges that this Court should not require the **impossible,** and should not require an Appellant's Counsel to kill himself.

(4)

Appellant's previous Petition for Rehearing, filed on April 3, 1958, and granted in an indirect manner by the Order of April 16, 1958, is embodied herein by reference.

Appendix—Appellant's Petition for Rehearing of Dismissal Order of 4-16-58

WHEREFORE, Plaintiff-Appellant prays:

1. That this Court may rehear and reconsider this cause, and vacate the order and judgment dismissing it.

2. That this petition may receive the consideration of this Court *in banc*, whether heard orally or not.

3. *That this Court may exercise its discretion to hear oral argument* on this petition under Rule 25(a) in view of the importance of the case and the unusual and important question of administration of justice in this Court sought to be presented by the petition.

4. And for all further just and proper relief in the premises.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Plaintiff—Appellant.

(Bold face emphasis as in original.)
Tr. pp. 107-110.

Appendix—Appellant's Tender of Affidavits of Drs. Turner and Jones

APPELLANT'S TENDER AND MOTION TO FILE AFFIDAVITS OF DRS. HORACE TURNER AND E. S. JONES

(Filed May 5, 1958)

Comes now the appellant and respectfully calls the court's attention to the fact that his pending rehearing petition, filed herein as of May 1, 1958, makes reference to the fact that affidavits of the physicians of appellant's counsel, Jay E. Darlington, are both "filed herewith."

Appellant respectfully shows to the court, by the affidavit of his said counsel hereto appended, that it was impossible, because of the pressure of time in preparing the rehearing petition and other imperative work, for appellant's counsel to get these affidavits physically signed and filed by May 1, 1958, but same are tendered herewith for filing, *as an adjunct of said rehearing petition*, at the earliest possible date, which affidavits read as follows, to-wit:

State of Illinois }
County of Cook } ss.

HORACE E. TURNER, being first duly sworn, deposes and says:

I make this affidavit at the request of my patient, Jay E. Darlington, for the information of whom it may concern, including the United States Court of Appeals for the Seventh Circuit:

This is to advise that Mr. Jay Darlington, a patient of mine, collapsed while working at his office on January 12, 1958, and was found lying unconscious on the floor

and removed to the hospital for treatment. He recovered and was later examined in my office on January 16, 1958, at which time it was my opinion that the patient was exhausted from overwork and was advised to slow down. Inasmuch as his recovery was not prompt, he was placed in the Augustana Hospital in March of this year and after a complete work-up, he was again warned that his collapse was due to exhaustion from overwork, and he was advised by me that his poor health could not be improved by means of drugs and it was absolutely imperative that he reduce his long hours and his volume of work if he improves.

Based upon his medical history as I obtained it in the aforesaid examinations, and also based upon his physical condition as I found it in said examinations, **it is also my opinion that said condition of overwork and exhaustion above described had been developing for a period of several months before said collapse and reached an acute stage culminating in said collapse on January 12, 1958.** (Our bold face emphasis.)

/s/ Horace E. Turner, M.D.

Subscribed and sworn to before me this 3rd day of May, 1958.

/s/ John R. Jeffers
Notary Public

(Seal) My commission expires: 8/4/61

State of Indiana)
County of Lake) ss.

E. S. JONES, being first duly sworn, deposes and says:

I make this affidavit at the request of my patient, Jay E. Darlington, for the information of whom it may con-

rn, including the United States Court of Appeals for e Seventh Circuit:

For a number of years, I have been the personal physician of attorney Jay E. Darlington, Hammond, Indiana. On the evening of January 12, 1958, I was called to St. Margaret's Hospital in Hammond to treat him, after he had collapsed unconscious at his desk and had been found and brought to the hospital by the inhalator squad of the Fire or Police Department. He continued unconscious for a period of several hours, after which he revived.

My diagnosis was that he was suffering from acute nervous exhaustion, brought on by prolonged overwork over a period of several months preceding the collapse. My advice was an immediate suspension of work for several weeks, followed by a reduced work schedule, in order to avoid serious and permanent damage to his health. (Our bold face emphasis.)

/s/ E. S. Jones

Subscribed and sworn to before me this 4th day of May, 1958.

/s/ Theodore M. Gemberling
Notary Public

(Seal) My commission expires: December 16, 1961

Tr. pp. 111-113.

Appendix—Appellant's Tender of Affidavits of Drs. Turner and Jones

State of Indiana)
County of Lake) ss.

JAY E. DARLINGTON, being first duly sworn, says:

The fact allegations in the above affidavits of Dr. Turner and Dr. Jones are true, except only the medical opinions therein expressed, as to which he is not competent, but he believes with good cause that the latter are true because of the fact that said doctors are eminent physicians and surgeons of long practice in Chicago and Hammond respectively, who have testified as experts for many years in cases reviewed by this Court.

Affiant further says he mailed true copies of the above motion and affidavits on May 4, 1958 to each counsel for appellees, namely, Gottlieb and Schwartz, 231 S. La Salle Street, Harold T. Bere, and Nelson Boodell and Will, 33 N. La Salle Street, Chicago, Illinois.

/s/ Jay E. Darlington

Subscribed and sworn to before me this 4th day of May, 1958.

/s/ Theodore M. Gemberling
Notary Public

(Seal) My commission expires December 16, 1961.

PPELLANT'S TENDER AND MOTION FOR LEAVE TO FILE HIS PRINTED APPELLANT'S BRIEF AND APPENDIX

(Filed May 6, 1958)

Comes now the Appellant and tenders by his printer, printed Appellant's Brief and Appendix "Vol. I" and ks leave to file same presently, and also leave to file e remaining Vols. II - X, which are now in process of inting by his printer, U. S. Law Printing Company, ame to be filed as rapidly as printed and within the next days, and shows:

1. **The reasons and necessity for prior delay in filing ame, and for the present request, are plainly and sufficiently shown in the series of prior pleadings filed herein by the Appellant, including his Petitions for Time, his Answer to the Motion to Dismiss, and his Petitions for Rehearing, all of which are embodied herein by reference to save needless repetition. Likewise, the affidavits of Dr. Turner and Dr. Jones and plaintiff's counsel filed herewith, are made a part hereof by reference.**

2. Relative to the Appendix, the printed Vol. I tendered rewith, in about 250 pages, comprises all the pleadings, ders and proceedings in the lower court, down through findings, conclusions, decree, notice of appeal, etc., aving only the oral testimony, trial proceedings, and ummary of exhibits to be filed in Vols. II - X, but these e so length that they will comprise an estimated 1500 dditional pages, which, in spite of all reasonable diligence by appellant's counsel and the printer, it has been impossible to complete by this time.

Tr. p. 114.

Appendix—Appellant's Tender of his Printed Brief and Appendix

Wherefore, appellant prays leave to file this tendered Brief and Appendix, aforesaid. (Our bold face emphisis.)

/s/ Jay E. Darlington
Attorney for Appellant

State of Indiana)
County of Lake) ss.

JAY E. DARLINGTON, being first duly sworn, says:

The allegations of the above motion are true, including those in the pleadings and documents embodied in the motion.

(Allegation of mail service follows.)

/s/ Jay E. Darlington

Subscribed and sworn to before me this 4th day of May, 1958.

/s/ Theodore M. Gemberling
Notary Public

(Seal) My commission expires December 16, 1961.

Tr. pp. 115-116.

Appendix—Appellees' Answer to Appellant's Tender of Affidavits, and to his Petition for Rehearing

ANSWER TO APPELLANT'S TENDER AND MOTION TO FILE AFFIDAVITS AND PETITION FOR REHEARING

(Filed May 8, 1958)

Now come Ben Jaffe, Guarantee Reserve Life Insurance Company of Hammond, Harold S. Schwartz and Associates, Inc., Harold S. Schwartz and Eugene Jaffe, Defendants-Appellees, by their several attorneys of record and state:

1. At this late date (nearly seven months after this appeal was docketed), appellant is tendering and has moved to file affidavits by two physicians in support of a petition for rehearing filed on May 2, 1958 (one day after it was due). The time for filing the brief and appendix of appellant initially expired on November 16, 1957. Appellant has since filed numerous motions for extensions of time and several answers to appellees' motions to dismiss. It is submitted to this Court that this is the first occasion where appellant's counsel has deigned to submit affidavits to the effect that appellant's counsel was in ill health as a basis for his procrastination in complying with the orders of this Court. Although we have no desire to make appellant's counsel's health an issue in this case (and it cannot be an issue at this late date), it is respectfully submitted that these affidavits can only be an after thought at this stage of the proceedings and that these tendered affidavits are submitted as a desperate last ditch effort by appellant's counsel to stay in court. No such affidavits were ever presented in connection with appellant's prior and numerous petitions for extensions. No mention was made of them in the first petition for a rehearing.

2. Although appellant's counsel vaguely alluded in two of his many prior pleadings to the fact that he had been ill in the middle of January, 1958, the principal and vital grounds for appellant's numerous requests for extensions of time were that counsel was preoccupied with other litigation, principally in the United States District Court for Puerto Rico, which necessitated his presence there "almost continuously from about November 20 to December 23, 1957" (see appellant's petition for additional time to file brief and appendix filed on January 31, 1958) and "from February 16 to March 1, 1958" (see appellant's answer to motion to dismiss appeal). Obviously, this preoccupation with other litigation in Puerto Rico and also in the Indiana state courts is in direct conflict with counsel's present assertions and affidavits that he was incapacitated physically during this period of time. He apparently had the time and energy to devote himself to all litigation except this appeal. In this connection, we again assert that there was no genuine intention to pursue this appeal and all that appellant apparently sought was to keep the case on the docket of this Court.

3. Appellant's counsel was assisted on the trial of this cause by two other attorneys, Mr. Leo S. Julian of the Florida bar and Mr. Mayo Galindo of the Texas bar. In addition thereto, Mr. John R. Jeffers of the Illinois bar was also an attorney of record below as he is in this Court. Regardless, therefore, of appellant's counsel's alleged illness and preoccupations, appellant has had available the benefit of the services of three additional counsel at all times. Appellant does not contend that one or all of these co-counsel were not in a position to prosecute this appeal and obey the rules and orders of this Court. This Court has stated that its rules are

expected to be followed. In re *Gammil*, 129 F .2d 501 (C.C.A. 7th). In *Gammil* there was, as there is here, more than one counsel and, as this court pointed out, the record indicated that appellant had been represented by three co-counsel and no reason was shown why, if one were ill, the others could not carry out the necessary steps in the cause. Consequently, this court denied in the *Gammil* case a motion for leave to docket an appeal after the time had expired.

4. Although it is submitted that the tendering of the affidavits in question are not timely and should not be considered by this Court at this late date in the light of the prevailing record, an examination of these affidavits indicates at best that counsel became ill while working at his office on January 12, 1958 and that he recovered quickly. No extended period of incapacity, either in the hospital or at home, is alleged. The Court should also note that by January 12, 1958 appellant had already obtained an extension of forty-five days for the filing of his brief and appendix to and including December 31, 1957 and was in the midst of a second extension to January 31, 1958.

5. When this record, which is replete with motions for extensions of time for docketing of this appeal and for extensions of time to file appellant's brief and appendix, is viewed in its entirety, this Court can only conclude, as counsel for appellees have concluded, that appellant has been treated most generously and liberally in obtaining extensions. On the other hand, appellant's counsel has not shown his good faith by making any efforts whatsoever to comply with the orders of this Court. The filing of any affidavits or other documents or tender through the printer of part of an appendix at this

late date is violative not only of the rules of this Court, but of all basic notions of due process and fair play.

6. Appellant's second petition for rehearing filed on May 2, 1958 is substantially insufficient in law in that it fails to state any point of fact or law whatsoever which this Court is supposed to have overlooked or misapprehended in its order of April 16, 1958. It is respectfully submitted that appellant's tender and motion to file affidavits should be denied and that the petition for rehearing filed on May 2, 1958 should likewise be denied. The Order of this Honorable Court of April 16, 1958 dismissing the appeal should stand.

Wherefore, appellees respectfully move that:

(a) Appellant's tender and motion to file affidavits be denied; and

(b) Appellant's petition for rehearing be denied.

Claude A. Roth and
Charles D. Stein
231 South LaSalle Street
Chicago, Illinois

/s/ Claude A. Roth, Charles D. Stein
Attorneys for Appellees Ben Jaffe and Eugene Jaffe

/s/ Hubert L. Will, Wayland Cedarquist
Attorneys for Guarantee Reserve Life Insurance Company of Hammond

/s/ Harold T. Bere
Attorney for Harold S. Schwartz and Harold S. Schwartz and Associates, Inc.

(Affidavit of service, appended).

Tr. pp. 117-122.

Appendix—Order of May 22, 1958 Filing Affidavits of Drs. Turner and Jones

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, May 22, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge
} en banc

William G. Burns, etc.,
Plaintiff-Appellant,

No. 12158 vs.

Ben Jaffee, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appellant's tender and motion (filed May 5, 1958) to file affidavits of Drs. Horace Turner and E. S. Jones, and appellees' answer thereto heretofore filed on May 8, 1958, are now considered by the court en banc, and the court en banc grants such motion and orders said affidavits filed:

Tr. p. 123.

Appendix—Order of May 23, 1958—Denying Rehearing, Refusing Oral Argument, and Refusing Tendered Brief and Appendix

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, May 23, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge
} en banc

No. 12158

William G. Burns, etc.,
Plaintiff-Appellant,

vs.

Ben Jaffee, et al.,
Defendants-Appellees.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appellant's petition (filed May 2, 1958) for rehearing and reconsideration of this court's order and judgment of April 16, 1958 dismisssing his appeal, embodying therein appellant's motion for consideration by the court en banc and motion for oral argument on such petition for rehearing, and appellees' answer thereto heretofore filed on May 8, 1958, are now considered by the court en banc. **And now the court en banc denies appellant's motion for oral argument on his petition for rehearing and further denies appellant's petition for rehearing and reconsideration of this court's order and judgment of April 16, 1958 dismissing this appeal.**

Appendix—Order of May 23, 1958—Denying Rehearing, and Refusing Oral Argument

Appellant's tender and motion (filed May 6, 1958) for leave to file his printed appellant's brief and appendix is now considered by the court en banc, and it is ordered by the court en banc that such motion for leave to file appellant's printed brief and appendix be denied. (Our bold face emphasis.)

Stay of Mandate

Upon appellant's written motion, order was entered staying mandate until August 21, 1958, pending filing of appellant's Petition for Certiorari. (Judge Hastings) Tr. p. 124.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 296

WILLIAM G. BURNS,
trading and doing business as International Advertising Agency,

Petitioner,

vs.

BEN JAFFE,

GUARANTEE RESERVE LIFE INSURANCE COMPANY of Hammond, Indiana, a corporation, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE
and tendered
PETITION FOR REHEARING OF
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit.

JAY E. DARLINGTON,
306 Hammond Building,
Hammond, Indiana,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

MOTION FOR LEAVE TO FILE

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and respectfully petitions for leave to file the appended Petition for Rehearing, and shows:

I. On October 13, 1958 this Court denied his Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, docketed under the above term number.

2. Petitioner did not file a Petition for Rehearing within twenty-five days thereafter, expiring November 7, 1958, nor Petition for an extension of that time, because that was not reasonably possible under the circumstances, to-wit: During said twenty-five day period, Petitioner's sole counsel herein, the undersigned Jay E. Darlington, was unavoidably and fully occupied with previously scheduled litigation in the federal courts, particularly the argument of an important civil appeal, No. 16817 in the United States Court of Appeals for the Fifth Circuit at Atlanta on October 21, and the preparation and argument of a large civil action No. 4639 in the United States District Court for Puerto Rico on November 5, 1958, — which required him to be absent from his office a substantial part of said period and absent from the country during the latter part of said period. This Petition for Rehearing has been prepared and tendered at the earliest reasonable opportunity thereafter.

3. The Court of Appeals stayed the going down of its mandate to the District Court pending the filing of this petition. No affirmative judgment is being stayed below. The judgment of the Court of Appeals is a dismissal of Petitioner's appeal from a judgment of the District Court which adjudged that this Petitioner as plaintiff recover nothing by his complaint in an important civil action seeking judgment in the sum of several million dollars.

4. The tendered Petition for Rehearing seeks to present a new *Constitutional* question of *due process*, unusual in character, which Petitioner believes deserves consideration by this Court, as appears on the face thereof. The important question involved on a motion of this kind, for leave to file, is whether the tendered Petition for Rehear-

ing has merit, — whether an error or injustice has resulted from refusal of Certiorari, — rather than the procedural speed of the petitioner's counsel.

WHEREFORE, Petitioner prays leave to file his tendered Petition for Rehearing which is hereto appended, and for all other just and proper relief. (The good faith of this Motion is included in the certificate at the foot of said Petition).

JAY E. DARLINGTON,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 296

WILLIAM G. BURNS,
trading and doing business as International Advertising Agency,

Petitioner,

vs.

BEN JAFFE,

GUARANTEE RESERVE LIFE INSURANCE COMPANY of Hammond, Indiana, a corporation, ET AL.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and respectfully petitions that the Court may rehear, reconsider and thereupon grant his Petition for Writ of Certiorari herein, which was denied by its order of October 13, 1958, and shows:

The New Constitutional Question Presented.

Petitioner contends that he was denied due process of law contrary to the Fifth Amendment by the Court of Appeals' unusual and arbitrary course of conduct in depriving his counsel of reasonable opportunity to file his Appellant's Brief and Appendix, ordering his appeal dismissed for lack of same, and then refusing leave to file same after it was printed and tendered at great labor and expense at the earliest opportunity.

This contention is predicated upon the same facts and record set forth in his Petition for Writ of Certiorari. But that Petition was predicated on the ground that this action by the Court of Appeals constituted a *mal-administration* of judicial proceedings calling for exercise of this Court's *supervisory* power under its *Rule 19, par. 1(b)*. (Petition for Certiorari, pp. 2, 20).

This *Constitutional* aspect of the factual situation was not presented in the Petition for Certiorari. Accordingly, Petitioner believes it fairly constitutes a new "substantial ground available to Petitioner although not previously presented" under *Rule 38, par. 2*. Failure to present it was because circumstances compelled petitioner's counsel to prepare and print the Petition for Certiorari under much pressure of time at the end of the 90-day period without an opportunity to study and develop this Constitutional aspect. In addition, he was convinced that the question of *mal-administration* was sufficiently clear to warrant relief, and he had in mind the principle that a reversal will not be predicated upon a Constitutional question if another adequate ground exists. This Court's order denying the Petition decides against petitioner on that question and it is not re-argued in the present Petition, though of course it is open for the Court's reconsideration on its own motion in its discretion, as an incident to considering this Petition.

Reasons for Rehearing.

Supporting this new Constitutional question, and as a new ground relied on for allowance of the writ, petitioner respectfully submits:

Factual Basis.

1. *In fact,* under the circumstances shown, the Court of Appeals deprived petitioner's sole counsel of a fair and adequate opportunity to prepare, print and file the necessary Appellant's Brief and Appendix, in view of the enormous size of the record which came up from the District Court, plus the intervening circumstance of his counsel's illness consisting of a physical collapse from overwork which occurred during the period allowed for preparing the Brief and Appendix. (Petition for Certiorari, pp. 4, 20; Appendix of Petition, pp. 63-67).

2. The unusual and arbitrary determination exhibited by the Court of Appeals *to circumvent and thwart* the petitioner's announced attempt to tender his Appellant's Brief and Appendix, *by making repeated orders dismissing the appeal before he could make his tender,* even though the first dismissal order was invalid because of the Court of Appeals' own violation of the Judicial Code in failing to have a duly constituted Division. (Petition for Certiorari, pp. 22-23).

3. Finally, the Court of Appeals' arbitrary refusal of the tendered Appellant's Brief and Appendix, while the matter was still pending before it. (Petition for Certiorari, p. 23, bottom; Appendix of Petition, pp. 67, 74-75).

(The manuscript transcript certified up to this Court by the clerk of the Court of Appeals, contains a copy of the tendered Appellant's Brief and Appendix, the latter being in three volumes of 572 pages, representing an obvious

cash outlay for printing of more than $3,000.00 in a good faith but so far futile attempt to present petitioner's case to the Court of Appeals. Naturally, this tendered Brief and Appendix could not be included or appended in the Petition for Certiorari, but it is described therein.) (Petition for Certiorari, p. 18; Appendix of Petition, p. 67).

Constitutional Basis.

While we have no quarrel with the present general policy of expediting litigation in the federal courts (*American Bar Association Journal*, Nov. 1958, Vol. 44, p. 1043), all will agree that **this policy should not be carried to the extreme of impeding the necessary and proper functions of the attorneys, who are themselves officers of the courts, and thereby in fact impairing the Constitutional rights of their clients to a fair and adequate hearing in the courts.** (*American Bar Association Journal*, Vol. 44, p. 1070).

The basic Constitutional principles here involved need no elaboration: Due process under the *Fifth Amendment*, applicable here, "has never been a term of fixed and invariable content" but requires a fair "*opportunity*" to be heard, and it depends on *the practical circumstances of each case* as to whether that opportunity has been denied and what procedure is reasonably necessary to measure up to it. (*Federal Communications Commission* v. *WJR, The Goodwill Station*, 1949, 337 U.S. 265, 275-276). The same is true on the analogous question of due process under the Fourteenth Amendment, where it is "an elementary and fundamental requirement" that the party be given a reasonable "opportunity" and "*a reasonable time*" to present his side of the case "*with due regard for the practicalities and peculiarities of the case*". (*Mullane* v. *Central Hanover Bank & Trust Co.*, 1950, 339 U.S. 306, 314-315). This protection is given to each "individual"

litigant; there must be an absence of "discrimination" *in fact*, and this Court will apply "scrutiny" to the particular situation to determine if this requirement is met. (*Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 21-22). See also in general on this point, *16A C.J.S., Constitutional Law, Sec. 622.*

True, the above cases deal with proceedings in trial courts or other lower tribunals. True also, as a general proposition there is no Constitutional right to take an appeal after a fair and adequate hearing in the lower tribunal. But when a right of appeal is granted to a class of litigants, as the Judicial Code does from final civil judgments in the District Courts (*28 U.S.C. 1291*), the Court of Appeals must hear such cases *without discrimination* as between litigants, and it must also exercise its functions in all cases in such manner as to perform its duties and afford a fair review in fact. (*National Union of Marine Cooks & Stewards* v. *Arnold*, 1954, 348 U.S. 37, 43. *16A C.J.S., Constitutional Law, Sec. 626, p. 847*).

Attorneys have a dual function, — as spokesman for their clients in the trial and review of cases, and also *as officers of the courts*, charged with important functions in aiding the work of the courts by fully and efficiently presenting the facts and law on their respective sides. They will poorly serve both their clients and the courts if they are unreasonably driven and deprived of adequate time to do their work. The courts, by the nature of their position and powers, are able to perform their functions without this hardship. They should afford equal consideration to the attorneys. The rules of this Court clearly indicate a policy that, while the attorneys should perform their functions expeditiously, they are also expected to aid the Court's work by an adequate presentation of the facts and law for review. The same policy should prevail in the lower courts.

Petitioner respectfully urges that this Constitutional aspect of due process, — the right of a litigant to have his attorney afforded a fair and adequate opportunity under the circumstances to present his case in the trial court or on appeal when the right of appeal exists, — is a question which has not frequently been presented here but which assumes increased importance and need for consideration by this Court as the counterpart of the current program of expediting litigation, to keep the latter from getting out of balance.

WHEREFORE, Petitioner respectfully prays that this Court may rehear, reconsider and thereupon grant his Petition for Writ of Certiorari, and that he may have all further just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

I certify that the foregoing Petition for Rehearing is filed in good faith and not for delay, and that to my best belief and understanding it presents a substantial ground available to petitioner although not previously presented, supporting the Petition for Writ of Certiorari herein, within the intent of this Court's Rule 58, par. 2. I further certify that the preceding Motion for Leave to File is likewise filed in good faith and not for delay, for the same purpose.

JAY E. DARLINGTON,
Attorney for Petitioner.